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No. 08-___

IN THE

Supreme Court of the United States

LEVEL 3 COMMUNICATIONS, LLC,

Petitioner,

v.

CITY OF ST. LOUIS, MISSOURI,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Rex S. Heinke
Michael C. Small
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
2029 Century Park East,
Suite 2400
Los Angeles, CA 90067

Thomas C. Goldstein
Counsel of Record
Anthony A. Pierce
W. Randolph Teslik
Patricia A. Millett
Tobias E. Zimmerman
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Did the Eighth Circuit err in holding, in acknowledged conflict with several other circuits, that local governments' fees and restrictions on telecommunication carriers' access to public rights-of-way are not preempted by federal law so long as they do not effectively preclude the plaintiff from providing telecommunications services?

RULE 29.6 STATEMENT

Petitioner Level 3 Communications, LLC is 100% owned by Level 3 Financing, Inc., which is itself 100% owned by Level 3 Communications, Inc., a publicly traded corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Level 3 Communications, LLC ("Level 3") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The district court's opinion invalidating provisions of the municipal ordinance at issue in this case (App. D, *infra*) is published at 405 F. Supp. 2d 1047. The court of appeals' opinion reversing (App. C, *infra*) is published at 477 F.3d 528. The district court's opinion on remand entering judgment for respondent (App. B, *infra*) is unpublished, but is available at 2007 WL 2860171. The court of appeals' subsequent opinion affirming (App. A, *infra*) is published at 540 F.3d 794.

JURISDICTION

The court of appeals entered its judgment on September 4, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This case involves two provisions of the Telecommunications Act of 1996. Section 253 of the Act is entitled "[r]emoval of barriers to entry." Section 253(a) provides:

> No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

47 U.S.C. § 253(a). Section 253(c) of the Act provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is disclosed by such government.

Id. § 253(c).

The Appendix reproduces the municipal ordinance challenged in this case, Chapter 23.64 of the St. Louis municipal code. App. F, *infra*.

STATEMENT OF THE CASE

Federal law preempts state and local regulations that impede the ability of telecommunications providers to furnish services. 47 U.S.C. § 253(a). With respect to fees for access to public rights-of-way, local governments are permitted only to charge carriers reasonable compensation on a competitively neutral basis. *Id.* § 253(c). Respondent has adopted an Ordinance that imposes significant burdens on the operations of non-incumbent telecommunications providers, including large fees for access to the public rights-of-way. The district court held that the Ordinance was preempted. The court of appeals reversed, expressly acknowledging that its decision conflicted with the decisions of multiple circuits in two separate respects.

1. In the Telecommunications Act of 1996 ("the Act") (codified as amended in United States Code

Titles 15, 18 and 47), Congress triggered a "fundamental[] restructur[ing] [of] local telephone markets" (*AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 371 (1999)) by facilitating competition by new telecommunications providers, "even if that meant swallowing the traditional federal reluctance to intrude into local telephone markets" (*Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 489 (2002)). The very title of the Act specifies its purpose: "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 110 Stat. 56 (1996). The Act accomplishes those twin goals through two principal requirements: that incumbent carriers interconnect their existing facilities with those of new entrants; and that state and local governments eliminate obstacles to competition.

This case involves the latter mandate, the "very heart" of which (141 Cong. Rec. S8134, 8175 (daily ed. June 12, 1995) (Sen. Pressler)) is Section 253 of the Act, entitled "Removal of barriers to entry." That provision was enacted to eliminate pervasive state and local restrictions that protected "incumbent" telecommunications providers (such as the Bell Operating Companies) from local competition and thereby frustrated competition by would-be entrants. Particularly targeted was local governments' monopoly control over the public rights-of-way that carriers must traverse in order to operate, which had been aggressively leveraged to extract enormous fees from prospective entrants.

Section 253(a) responds to such exclusionary measures by preempting any state or local regulation that would "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Congress thereby preempted any state or local law that "impedes the provision of telecommunications services." *Verizon*, 535 U.S. at 491. Although Congress in Section 253(a) broadly preempted state and local governments from applying regulations that would block telecommunications competition, in Section 253(c) it preserved their specific power "to manage the public rights-of-way [and] to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis."

2. Respondent City of St. Louis ("the City") has enacted a municipal Ordinance ("the Ordinance") that comprehensively regulates the construction, maintenance, and operation of telecommunications facilities in the City by non-incumbent telecommunications providers. *See* App. F, *infra* (reproducing the Ordinance); Court of Appeals Joint Appendix ("C.A. J.A.") 446-47 (Ordinance does not apply to incumbent carrier).

The City imposes on new telecommunications providers an array of regulations and costs as a condition on their entry into the St. Louis market. Some provisions of the Ordinance – not challenged here – require the provider to pay the actual costs that arise from use of the public rights-of-way, such as the costs associated with construction and excavation (Ch. 23.64.090(E); *see also generally* St. Louis Rev. Code Ch. 20.30), and of moving network

elements that interfere with any City project (Ch. 23.64.150(F)).

But the City also charges a further "license charge" – the equivalent of rent – for use of any public right-of-way. Ch. 23.64.090. That charge functions as a source of revenue for the City, as it is deposited into the City's general fund and is used to pay for expenses unrelated to public rights-of-way or telecommunications services generally. C.A. J.A. 159-60. The license charge is not based on the City's costs relating to the licensed provider's construction on and use of the public rights-of-way, which the City has not attempted to calculate. Instead, the City chose to base its fees on those charged by some other jurisdictions under regulatory schemes that pre-date Congress's enactment of Section 253. *Id.* 168, 171, 201, 2123. The license charge is computed as a multiple of the amount and type of conduit the telecommunications provider deploys or uses in the public rights-of-way. Ch. 23.64.090.

The City also requires each non-incumbent provider, *inter alia*, to indemnify the City from any liability, even that arising from the City's own negligence (*id.* 23.64.080(H), .130(A)); maintain insurance and a performance bond (*id.* 23.64.120); and use only those contractors approved by the City (*id.* 23.64.140(D)). The City may require the new entrant to meet technical standards set by the City over and above those set by the Department of Streets (*id.* 23.64.140), install conduit for the City's own use (*id.* 23.64.080(G)), and provide any additional information the City requires (*id.* 23.64.050(A)(7)). Once granted, a license cannot be transferred to another telecommunications provider

without the City's permission, even when the transfer is part of a sale or merger of the entire company. *Id.* 23.64.170.

Even if a non-incumbent telecommunications provider meets all of the many criteria set by the Ordinance, there is no guarantee that it will receive a license. Compliance with the ordinance merely "empower[s]" the City to issue a license. *Id.* 23.64.050(C). The City can also effectively block a provider's ability to offer telecommunications services by withholding the other permits necessary for construction or maintenance of the provider's facilities. *Id.* 23.64.080(G). The City furthermore reserves the power to revoke a license if it determines that the telecommunications provider violated the Ordinance or an implementing agreement with the City. *Id.* 23.64.080(C). In that instance, the City deems the provider's equipment to be "abandoned" and subject to seizure. C.A. J.A. 166.

The City maintains a separate regulatory scheme applicable to the incumbent telephone company, Southwestern Bell Telephone Company ("SWBT") (now part of AT&T Corp.). *See* St. Louis Rev. Code Ch. 23.34. That ordinance imposes far fewer administrative requirements, and requires SWBT to pay a "gross receipts tax" calculated on certain revenues from customers in the City, in contrast to the license charge imposed on new entrants. *Id.* 23.34.020.

3. Petitioner Level 3 Communications, LLC is one of the "competitive" telecommunications providers that the Telecommunications Act was enacted to encourage. Level 3 operates an extensive domestic and international telecommunications

network that employs "next generation" fiber-optic technologies to deliver data, video, and "voice over internet protocol" services. Level 3 provides these services over an extensive fiber-optic network, which is largely built underground. The network connects Level 3's customers to the traditional public switched telephone network, to other customer locations, and to the Internet.

The Level 3 intercity network passes through St. Louis and connects to Chicago, Indianapolis, Kansas City, and hundreds of other cities around the United States. Within St. Louis and many other cities, the network also connects to local businesses through fiber-optic cable placed across public rights-of-way. As new customers purchase services, Level 3 continually expands the reach of its network.

As a landline communications provider, Level 3 depends on access to local government rights-of-way to construct and extend its fiber-optic network. Pursuant to the terms of the Ordinance and after extensive delays occasioned by negotiations with the City, Level 3 secured a license to operate as a telecommunications provider in St. Louis. In addition to the conditions set forth in the Ordinance, the license granted by the City regulates the services Level 3 is able to provide, allowing it to serve only as a "competitive access provider." C.A. J.A. 485.

Through 2004, the City charged Level 3 over $550,000 in franchise fees for access to the public rights-of-way, and it claims that the company owes it more than $100,000 for the ensuing year. C.A. J.A. 134. Those franchise fees far exceed Level 3's annual revenue from customers in the City (*see id.* 425-27 (revenues are approximately $80,000 annually)) and

the ten-percent tax on gross receipts that Level 3 would pay under the provisions applicable to the incumbent carrier (Ch. 23.32.250).

In 2004, Level 3 filed this suit against the City alleging that the Telecommunications Act preempts the Ordinance. The district court agreed. App. D, *infra*. Preliminarily, the court considered whether the Ordinance's provisions were cumulatively "so burdensome that they effectively" amount to a prohibition on telecommunications services within the meaning of Section 253(a). Pet. App. 48a (citation omitted). The district court assessed the burdens imposed by the Ordinance's provisions "in combination" and found that they "have the effect of prohibiting the ability to provide telecommunications services." *Id.*

The district court then turned to "whether provisions of the Ordinance are saved" as "fair and reasonable *compensation*." Pet. App. 50a (quoting 47 U.S.C. § 253(c) (emphasis added)). The district court concluded, based on the text and legislative history of the Act, that Congress intended "that telecommunications companies should only be required to pay their share of fees to enable local governments to recover the increased street repair and paving costs that result from repeated excavations of the rights-of-way." *Id.* 53a (quotation omitted). Accordingly, the court held that Section 253(c) does not save "revenue-based fees" from preemption. *Id.* 52a.

In this case, the City conceded that its fees "are not based on its costs." *Id.* 50a. It moreover offered no "evidentiary support that the fees at issue here have *any relation* to the City's costs in managing,

inspecting, and maintaining its rights-of-way." *Id.* 54a (emphasis added). Section 253(c) was accordingly inapplicable. *Id.*

4. The Eighth Circuit reversed and remanded. App. C, *infra*. The court of appeals held that, by its plain terms, Section 253(a) proscribes only those local laws that result in "actual or effective prohibition [on a telecommunications service], rather than the mere possibility of prohibition." Pet. App. 29a. "The plaintiff need not show a complete or insurmountable prohibition, but it must show an existing material interference with the ability to compete in a fair and balanced market." *Id.* 31a (citations omitted). Applying that standard, the court of appeals found it dispositive that the City had not "used [its] authority to *actually* exclude a provider or service," and that Level 3 had not identified any "additional services" it would have provided "had it been able to freely use the money that it was forced to pay to the City." *Id.* 32a (emphasis in original).

The court of appeals further held that Section 253(c) does not independently preempt local regulations, but instead serves solely as a savings clause for regulations on access to public rights-of-way that otherwise would be preempted by Section 253(a). Pet. App. 28a-29a. Because Level 3 had failed to prove that the Ordinance fell within the terms of Section 253(a), the court held that the City's license fee for access to rights-of-way could stand regardless of whether it exacted "fair and reasonable compensation" or discriminated against new entrants. *Id.* 33a n.2.

In so ruling, the Eighth Circuit acknowledged that "[t]he language and structure of section 253 has,

to understate the matter, 'created a fair amount of confusion'" in the courts (Pet. App. 27a (quoting *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235, 240 (3d Cir. 2002))), and that other circuits "disagree with our understanding" of the statute (*id.* 28a).

The Eighth Circuit specifically rejected the rulings of other circuits in two separate respects. The court disagreed with the holding of the First and Tenth Circuits that Section 253 preempts license fees that impose indirect, as well as direct, burdens on the provision of telecommunications services. Pet. App. 30a (citing, *inter alia*, *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004); *Puerto Rico v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006)). In the Eighth Circuit's view, "No reading results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services, as our sister circuits seem to suggest." *Id.*

The Eighth Circuit also explicitly rejected the Sixth Circuit's holding that a licensing fee is subject to preemption under Section 253(c) even if it "did not violate [S]ection 253(a)." Pet. App. 28a (citing *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000)).

6. On remand, the district court entered summary judgment for the City (App. B, *infra*), reasoning that "the only course of action left is for the Court to enter judgment in [the City's] favor" (Pet. App. 20a). The Eighth Circuit, in turn, affirmed, reasoning that the district court did not abuse its discretion in refusing to conduct further proceedings

on the burden imposed by the Ordinance. App. A, *infra*.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the court of appeals erroneously truncated the preemptive effect of critical provisions of the Telecommunications Act and, in so doing, exacerbated a recurring conflict in the courts of appeals. Only this Court's intervention can bring much-needed uniformity and stability to this important area of federal law.

More particularly, the ruling below significantly curtailed the preemptive effect of Section 253(a)'s barrier to local restrictions on telecommunications services by holding that only regulations that effectively prevent the individual plaintiff company from providing services are barred. That reading is squarely foreclosed by the Act's text, structure, and purpose.

As the court of appeals itself recognized, its ruling also expands not just one, but two, different conflicts in the circuits on questions that are central to the Telecommunications Act's operation and that are determinative of the lawfulness of similar licensing regimes adopted by local governments across the Nation. Only this Court can resolve these ever-expanding conflicts over the Act's operation and eliminate the substantial uncertainty that both telecommunications providers and local governments now confront. This continued and indeed increasing inconsistency strengthens the very barriers to entry to the provision of competitive telecommunications services that Congress adopted the Act to eliminate.

I. The Eighth Circuit's Ruling Misconstrues Central Provisions Of The Telecommunications Act Of 1996.

Section 253(a) of the Telecommunications Act preempts any provision of state or local law that would "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Reading Section 253(a)'s bar on laws that "prohibit" services to refer only to regulations that forbid or preclude the provision of telecommunications, the court of appeals held that Section 253(a) applies only if a telecommunications provider can demonstrate that the challenged regulation created an "existing material interference" in its ability to provide services. Pet. App. 31a. Under that standard, the Eighth Circuit held that the Ordinance was not preempted because the City had neither "*actually* exclude[d]" any service nor effectively prevented Level 3 from offering "additional services." *Id.* 32a.

The Eighth Circuit reasoned that its rigidly narrow construction was dictated by the statute's "clear" meaning. *Id.* 30a. But that cramped reading of Section 253(a)'s protective scope is wrong. The only thing that is "clear" about Section 253 is that it "is quite inartfully drafted and has created a fair amount of confusion." *New Jersey Payphone Ass'n v. Town of W.N.Y.*, 299 F.3d 235, 240 (3d Cir. 2002). *Cf. Nixon v. Mo. Mun. League*, 541 U.S. 125, 134 (2004) (meaning of "ability" in Section 253(a) is "not clear").

The court of appeals erred in three separate respects, which together and separately demonstrate that the ambiguity of Section 253(a) is properly

resolved by holding that a local regulation is preempted when it inhibits competitors' entry into local telecommunications markets. Specifically, the Eighth Circuit misunderstood the text of Section 253(a), the purpose of the Telecommunications Act, and the statutory structure. This Court should accordingly reaffirm its prior recognition that Section 253(a) preempts not only local regulations that exclude providers, but also laws that "*impede*[] the provision of telecommunications services" (*Verizon Comms., Inc. v. FCC*, 535 U.S. 467, 491 (2002) (emphasis added)), or "*interfere* with the delivery of telecommunications services" (*Nixon*, 541 U.S. at 140 (emphasis added)).

First, the court of appeals misread the text of Section 253(a). Contrary to the court of appeals' assumption, the term "[p]rohibit" commonly has a less absolute meaning than that adopted below, and properly refers to actions that "hold back," "hinder," or "obstruct." Random House Webster's Unabridged Dictionary 1546 (2d ed. 1998). For example, a plan of action may be "cost prohibitive" even if it technically could be pursued, albeit only at an economic loss.

The Eighth Circuit further misconstrued the text by overlooking that the essential question under Section 253(a) is *what* must be "prohibited" for preemption to attach. The court of appeals assumed that the statute looks only to the effect of regulation on the particular services offered by the specific provider asserting preemption. The Telecommunications Act, however, forbids any state or local requirement that has a prohibitive effect on "the ability of *any* entity to provide *any* interstate or

intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added).

The statutory language is thus sweeping, and its plain text dictates, consistent with the Act's overriding and express purpose of encouraging competition through forced deregulation, that the preemption inquiry focus on whether the challenged restriction limits providers' entry into the relevant market – *i.e.*, whether the law has the practical effect of inhibiting the provision of telecommunications services by providers. The mere fact that the plaintiff telecommunications provider – here, Level 3 – entered the market notwithstanding the burdens of the challenged regulation does not end the preemption inquiry.

The conclusion that the Eighth Circuit misread the text of Section 253(a) is reinforced by the fact that the ruling below largely nullifies that provision's prohibition on even those local regulations that have the "effect" of prohibiting telecommunications services. Indeed, under the court of appeals' reading of the Act, it is hard to see how any of the local rules that concerned Congress in adopting the Telecommunications Act would, in fact, be preempted. In adopting the Eighth Circuit's construction, the Ninth Circuit, for its part, concluded that Section 253(a)'s textually comprehensive "effect" provision would operate only to proscribe such far-fetched and entirely imaginary ordinances as laws dictating that "all facilities be underground [notwithstanding that] wireless facilities must be above ground," or that "no wireless facilities be located within one mile of a road." *Sprint Telephony PCS v. County of San Diego*, 2008 U.S.

App. LEXIS 19316, at *22 (9th Cir. Sept. 11, 2008) (en banc). That reading cannot be squared with this Court's admonition that Section 253(a) be read to "work like a normal preemptive statute" and certainly that it not be read in a way that "would often accomplish nothing." *Nixon*, 541 U.S. at 138.

Second, the Eighth Circuit's interpretation of Section 253(a) fails because it contravenes the very purpose of the statute. The ruling below grants local governments an extraordinarily broad power to undermine competition by limiting the entry of telecommunications providers into local markets – including by enforcing regulations that discriminate against the "new entrants" that the Act was designed to encourage. The "primary purpose" of the Act was the opposite: "to reduce regulation and encourage the rapid deployment of new telecommunications technologies." *Reno v. ACLU*, 521 U.S. 844, 857 (1997). The statute is indeed "the most deregulatory telecommunications legislation in history." 142 Cong. Rec. H1145, H1146 (daily ed. Feb. 1, 1996) (Rep. Linder). Under the regime envisioned by the Eighth Circuit, however, it would be all but impossible "to achieve the entirely new objective of uprooting the monopolies" in local telecommunications that existed before the Act (*Verizon*, 535 U.S. at 488-89), given the strangle-hold that local governments would continue to possess over the provision of telecommunications services by new carriers.

Monetary fees unhinged from actual costs have a unique capacity to obstruct competitive telecommunications services because they raise expenses and limit the development and deployment of equipment and new technologies. The record in

this case, for example, demonstrates that the roughly $100,000 that the City demands annually from Level 3 is diverted from funds that the company would use to provide additional and improved services to customers. C.A. J.A. 423, 433. At the same time, that exorbitant charge concededly bears no relationship whatsoever to actual costs incurred by the local government in ceding the right-of-way. *See supra* at 8-9.

In the Telecommunications Act, Congress sought to spur competition by providers that were new entrants to local markets. These would-be competitors come in all sizes: some are major corporations, while others are start-ups with limited resources. Many have the financial wherewithal to pay almost any fee that a local government could plausibly impose and would agree to pay that fee if the provider had no practical choice but to traverse a particular right-of-way – *even if* the fee would make the provision of local competitive telecommunications services uneconomical on a standalone basis. Yet, under the Eighth Circuit's view, a local government's assessment of any outrageous and competition-inhibiting charge does not amount to a preempted "prohibition" under Section 253(a) as long as it is paid, regardless of the disincentives and financial dislocations it creates.[1]

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[1] Congress cannot have logically intended the test for preemption under Section 253(a) to be whether the challenged regulation imposes a greater burden than the market will bear. That rule would be self-executing; no statutory preemption provision would be needed to enforce it. Nor is the market a logical measure of reasonable burdens. In any given

The practical harm caused by the court of appeals' ruling cannot be discounted. The Eighth Circuit essentially concluded that, because Level 3 elected to proceed to construct its network and provide service even in the face of a licensing regime that imposed unreasonable and discriminatory fees and regulations, the company had essentially defeated its own claim. In order to establish a violation of Section 253(a), the court of appeals would implausibly require that a non-incumbent provider such as Level 3 (a) succumb to an onerous regime like the City's by abandoning that local market, (b) suffer significant customer losses as a consequence, and then (c) initiate costly litigation against the local government in the hope of prevailing on a claim under the Telecommunications Act.

The court of appeals' ruling is further contrary to the Act's purposes because it fails to account for the burden that would arise from the adoption of similar

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municipality, the market may bear costs that would be uneconomical if measured from the perspective of the services provided only to local customers in that jurisdiction. A telecommunications system reflects so-called "network effects," by which the benefit of each additional subscriber includes not just revenues derived from that individual, but the value to all other users of the network of the connection to the new subscriber. *See, e.g.*, Bridger M. Mitchell, Alternative Measured-Service Rate Structures for Local Telephone Service 7 (1980). The same effect arises from the addition of an entirely new city to the network and, conversely, a disproportionate loss arises from the failure to serve the city. The result is that Level 3 simply cannot afford *not* to serve a significant city such as St. Louis, even in the face of the massive and discriminatory costs imposed by the Ordinance.

restrictions by other jurisdictions around the nation. As this Court has previously explained, "[t]o get at Congress's understanding" of Section 253(a)'s intended scope, "a broader frame of reference" is "needed" – one that "ask[s] how Congress could have envisioned the preemption clause actually working." *Nixon*, 541 U.S. at 133. Congress could not have intended that local jurisdictions would continue to enrich themselves at the expense of the national telecommunications infrastructure and consumer welfare. *See, e.g.*, Dionne Searcey, *Spotty Reception: As Verizon Enters Cable Business, It Faces Local Static*, Wall Street J., Oct. 28, 2005, at A1 (identifying $13 million "wish list" demanded by Tampa, Fl. as condition of expanding high-speed network).

The Eighth Circuit's blinkered assessment of the City's fee ignores this Court's admonition. The Eighth Circuit's analysis began and ended with the question whether Level 3 (an international telecommunications service provider) determined to construct its fiber-optic network and to provide services. The court accorded no significance to the fact that the fee imposed by the Ordinance far exceeded any fair compensatory cost to the City and the meager revenues Level 3 derives from customers in the City. The court's analysis also failed to come to grips with the fact that multiplication of the City's charge by other local governments across petitioner's 110,000-mile telecommunications network would be financially paralyzing. If every municipality imposed the per-foot fees authorized by the Eighth Circuit here, Level 3 would face additional annual costs in the *billions* of dollars. *See Massachusetts Turnpike*

Auth. v. Level 3 Commnc'ns, LLC, Level 3's Motion for Summary Judgment, Case No. 1:06-cv-11816-DPW, at 23-24 (D. Mass. Mar. 19, 2008) (demonstrating that a fee of $2.79/ft, which is comparable to the fees imposed by St. Louis, would cost over $2.8 billion per year if applied across Level 3's entire network). Congress could not plausibly have intended that result.

At bottom, the unchecked power to charge whatever a market will bear for access to rights-of-way gives local governments monopoly power over providers' access to customers. The City's attempt to leverage its complete control over public rights-of-way within its jurisdiction by exacting exorbitant monopoly rents from new entrants lies at the very heart of the local obstacles to competition that Congress enacted Section 253(a) to eliminate. "Without access to local government rights-of-way, provision of telecommunications service using land lines is generally infeasible . . . ." *TCG NY v. City of White Plains*, 305 F.3d 67, 79 (2d Cir. 2002).

The Eighth Circuit's reading also confounds the Act's "promise of national consistency" (*Nixon*, 541 U.S. at 138) and "uniformity" in regulation (141 Cong. Rec. S8134, S8174 (daily ed. June 12, 1995) (Sen. Hollings)), which is critical to ease the entry of providers into the marketplace. The court of appeals' decision leaves local governments with the unchecked power to impose a dizzying array of inconsistent fees and restrictions as a condition of access to local public rights-of-way. The rule applied by the Eighth Circuit in this case permits each local government to impose its own unique variety of unreasonable and competitively biased fees and regulations (such as

those that favor the incumbent carrier over new entrants), provided only that these measures do not literally preclude the plaintiff telecommunications provider from offering services. Section 253, by contrast, was enacted to provide "a guarantee of uniformity across the country," without which new entrants would face the "uncertainty of not knowing what every city will do, of not knowing what every State will do." *Id.* at S8176 (Sen. Pressler).

Third, the Eighth Circuit's ruling cannot be reconciled with the structure of the Act – in particular, the relationship between Sections 253(a) and 253(c). Fees for access to public rights-of-way were a sufficiently central concern to Congress that it enacted a special provision governing their validity, authorizing "State or local government[s] to manage the public rights-of-way [and] to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis." 47 U.S.C. § 253(c). The Eighth Circuit's reading of Section 253(a), however, puts it at cross-purposes with Section 253(c).

The Eighth Circuit deemed Section 253(c) to be irrelevant on the ground that it is an "exception" to the preemptive sweep of Section 253(a). Pet. App. 28a. That makes no sense. On the court of appeals' reading, Section 253(c) is no "exception" at all because Section 253(a) leaves local governments free to impose any regulatory fees or restrictions except those few measures that directly interfere with the provision of particular telecommunications services. The decision below thus all but reads Section 253(c) out of the statute, for the "exception" for "reasonable" and neutral fees never implicates the general

prohibition and thus never comes into play. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[W]ords of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole.").

The far better and more logical reading of Section 253 is that fees for access to public rights-of-way function as "prohibitions" on telecommunications services barred by Section 253(a), unless they are "fair and reasonable" and non-discriminatory (for example, because they are based on the city's costs) and thus saved from preemption by Section 253(c). That reading allows the two subsections to work together as Congress intended to promote telecommunications services while balancing the legitimate needs of local governments for fair compensation. Because, in this case, the district court found (and the court of appeals did not dispute) that the exorbitant fees exacted under the Ordinance are not reasonable and bear no relationship to the City's own costs, they are preempted because they serve no purpose other than to obstruct market entry.[2]

In this case, the City frankly acknowledges never even having undertaken a study of its costs (C.A. J.A.

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[2] A ready point of reference for determining the "reasonableness" of a franchise fee is provided by Title VI of the Act, which limits such fees imposed on cable television providers to five percent of gross revenues. 47 U.S.C. § 542.

201), which are minimal. The Ordinance requires telecommunications providers – not the City – to pay not only all of the costs relating to construction, but also a separate fee to excavate on public rights-of-way, as well as the cost of moving any network element that interferes with any City project. Ch. 23.64.090(E), .150(F); Ch. 20.30. The entire budget of the City's Communications division is paid by cable television franchise fees, revenue wholly unrelated to the fees at issue here. C.A. J.A. 159-60. Revenues from the license fees paid by Level 3 and other non-incumbent telecommunications providers, by contrast, are deposited into the City's general fund to finance municipal operations, such as parks and schools. *Id.*[3]

The non-fee provisions of the Ordinance challenged by Level 3 are similarly not saved from preemption because they cannot be understood as a legitimate means of managing the public rights-of-way *at all*. 47 U.S.C. § 253(c). Several provisions of the Ordinance expressly regulate telecommunications *services*, rather than use of the City's rights-of-way. The Ordinance thus avowedly regulates not merely the use of public rights-of-way but the "operation . . . and use of a communications transmission system." Ch. 23.64.030(A). The license in this case, for example, precludes Level 3 from offering anything other than "competitive access provider services" in

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[3] The fees exacted from new entrants are a particularly attractive source of revenue for the City because, unlike taxes, they are exacted from parties that do not have a role in the local democratic process.

the City. C.A. J.A. 485. In fact, the City acknowledges that the agency charged with enforcing the Ordinance does not "manage the public rights-of-way." *Id.* 165.

Nor are the remaining measures "competitively neutral." 47 U.S.C. § 253(c). Other equivalent users of public rights-of-way – such as electric and gas utilities – are exempt from its provisions. C.A. J.A. 165, 180. Equally important, the incumbent telecommunications carrier in the City is not required to comply with the Ordinance. *Id.* 446-47. Yet there is no material difference between the use of public rights-of-way by Level 3 and those companies. As the regulatory manager of the City's Communications Division acknowledged, "Digging is digging." *Id.* 165.

Certiorari should be accordingly granted to correct the Eighth Circuit's erroneous construction of Sections 253(a) and 253(c).

II. The Eighth Circuit's Decision Expands Two Conflicts Over The Important And Recurring Question Of Section 253's Preemptive Effect.

As the Eighth Circuit candidly acknowledged, its decision compounds two conflicts in circuit law governing the preemptive scope of Sections 253(a) and 253(c). Pet. App. 29a-30a; *supra* at 10. As a result, the ability of local governments to impose fees and similar restrictions on telecommunications providers under a single, uniform federal law now varies dramatically based on nothing more than accidents of geography. That plainly was not Congress's intent.

1. The conflict in the circuits is widespread and entrenched. The Eighth Circuit denied en banc review of its ruling. App. E, *infra*. Its decision has in turn been embraced by the Ninth Circuit in its recent en banc decision in *Sprint Telephony PCS v. County of San Diego*, 2008 U.S. App. LEXIS 19316 (9th Cir. Sept. 11, 2008). In *County of San Diego*, the en banc Ninth Circuit overruled its prior precedent and "join[ed] the Eighth Circuit" in adopting a "narrow interpretation of the preemptive effect of § 253(a)." *Id.* at *15. The Ninth Circuit accordingly held that "a plaintiff suing a municipality under [S]ection 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition" (*id.* at *14), and thus is required to prove that "the *actual* effects of the city's ordinance" amount to a practical prohibition on providing services (*id.* at *16 (emphasis in original)). In so holding, the Ninth Circuit expressly rejected the law adopted in "[t]hree of our sister circuits," which affords Section 253(a) a more functional scope. *Id.* at *13.

The opposite rule governs in the First, Second, and Tenth Circuits. In *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006), the First Circuit invalidated a municipal ordinance conditioning access to municipal rights-of-way on payment of a five-percent fee on gross revenues from outgoing calls. The First Circuit held that Section 253(a) bars not only direct barriers to operations imposed by a local government, but also any requirements that, if imposed cumulatively by numerous municipalities, would "significantly increase a [provider's] costs and reduce the profitability of its operations." *Id.* at 18. That

broader, more practical inquiry, the court of appeals explained, was required by "the interconnected nature of utility services across communities and the strain that the enactment of [similar] fees in multiple municipalities would have." *Id.* at 17. The First Circuit further held that Section 253(c) does not save a fee from preemption unless, "at the very least," the fee is "*related* to the actual use of rights of way and . . . the costs of maintaining those rights of way are an essential part of the equation." *Id.* at 22 (citation and alterations omitted).

Likewise, the Second Circuit held in *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002), that an ordinance has "the effect of prohibiting" telecommunications services and thus is preempted by Section 253(a) if it creates "obstacles . . . to [the provider's] ability to compete," regardless of whether those barriers are direct or indirect. *Id.* at 76. Applying that rule, the Second Circuit held that Section 253(a) invalidated an ordinance that gave a local government discretion in deciding not to grant a license (even if that discretion was not exercised) and where negotiations over the license gave rise to "extensive delays" in the provider's ability to deliver its services. *Id.* The court of appeals also invalidated provisions of the ordinance that "required disclosures to be made about the telecommunications services to be provided, the sources of financing for the telecommunications services, and the qualifications to receive a franchise." *Id.* at 81. Those requirements, the Second Circuit explained, "were relevant only for regulating telecommunications, which § 253 does not permit [a local government] to do, not for regulating use of the rights-of-way, which

[it] may do." *Id.* Finally, the court of appeals struck down limitations on the providers' ability to transfer their rights to third parties, reasoning that "a provision of sweeping breadth whose main purpose is to force each new telecommunications provider to receive [a local government's] blessing before offering services, even if its services represent no change from the services offered and burdens imposed by a prior franchisee, is invalid." *Id.* at 82.

The Tenth Circuit has taken a similar tack. In *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004), the Tenth Circuit invalidated a municipal ordinance that imposed a fee and numerous administrative conditions as prerequisites to telecommunications providers' access to public rights-of-way. According to the Tenth Circuit, Section 253(a) preempts state and local measures that "materially inhibit the provision of services," which it interpreted (in contrast to the Eighth Circuit, Pet. App. 30a) to include an ordinance that imposes "substantial costs." 380 F.3d at 1271. Applying that standard, the court held that Section 253(a) preempted an ordinance that "create[s] a significant burden" by requiring telecommunications providers to secure a lease, pay significant rents, and provide additional conduit space for the local government. *Id.* at 1270.

The Tenth Circuit further held that the fees were not saved from preemption by Section 253(c) as "fair and reasonable compensation," because they neither were "limited to a recovery of costs" nor otherwise accounted for "the extent of the use contemplated, the amount other telecommunications providers would be willing to pay, and the impact on the profitability of

the business." *Id.* at 1272. Likewise, the Tenth Circuit held that Section 253(c) offered no shelter to the requirement that the carrier provide the government with conduit capacity, since such requirements are "not competitively neutral because they place the risk on the [provider] who first installs any conduit." *Id.* at 1273. Finally, the Tenth Circuit's rule governing the preemptive scope of Section 253(a) separately invalidated an ordinance provision that granted the municipality "broad discretion in determining whether or not to accept a registration or lease application." *Id.*

As both the Eighth and Ninth Circuits expressly recognized, different rules of law would have been applied – and they would have dictated a different outcome – had this case arisen within the First, Second, or Tenth Circuits. Pet. App. 29a-30a (acknowledging conflict with First and Tenth Circuits); *County of San Diego*, 2008 U.S. App. LEXIS 19316, at *13 (acknowledging conflict with First, Second, and Tenth Circuits).[4] The Eighth and Ninth Circuits avowedly adopt a "narrow interpretation of the preemptive effect of § 253(a)" (*County of San Diego*, 2008 U.S. App. LEXIS 19316, at *15), holding that the statute applies only to the vanishingly small group of local rules that in practice would proscribe the provision of telecommunications services, such as

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[4] The Eighth Circuit's opinion in this case also acknowledged a conflict at the time with the Ninth Circuit. Pet. App. 45a-46a. As noted in the text (*supra* at 24), the en banc Ninth Circuit subsequently overruled its prior precedent to adopt the standard applied by the ruling below. *County of San Diego*, 2008 U.S. App. LEXIS 19316 at *13.

a requirement that wireless services be provided underground even though cell phone towers cannot function in that fashion. By contrast, in the First, Second, and Tenth Circuits, ordinance provisions like those imposed by St. Louis are preempted whenever they impose a substantial burden or cost – albeit a surmountable one – on the telecommunications provider. *City of Santa Fe*, 380 F.3d at 1271 ("substantial cost"); *City of White Plains*, 305 F.3d at 76 ("obstacles . . . to [the provider's] ability to compete"); *Municipality of Guayanilla*, 450 F.3d at 18 (fees, if adopted by other jurisdictions, would "significantly increase a [provider's] costs").

The conflict is outcome determinative in this case. The Ordinance challenged by Level 3 has all of the features that the First, Second, and Tenth Circuits have held violate Section 253(a). The City has significant and unconstrained discretion to allow a telecommunications provider to offer services or to limit the types of service a provider may offer. That is so because the Ordinance only "empower[s]" the issuance of the license, which also may be withheld if the City chooses to deny other permits that are required to operate or if "the proposed use is inconsistent" with the City's undefined criteria. *Compare City of White Plains*, 305 F.3d at 76 (finding similar ordinance terms preempted); *City of Santa Fe*, 380 F.3d at 1273 (same). Furthermore, negotiations over the terms of a license can give rise to significant delays, as the ten-month delay in this case well demonstrates (C.A. J.A. 396), and the City wields a veto power over the subsequent transfer of the license. *Compare City of White Plains*, 305 F.3d

at 76, 82 (preempting ordinance based on substantial delays and control over license transfers).

Once the license is issued, moreover, the St. Louis Ordinance imposes a significant cost on telecommunications providers. Indeed, the more than $500,000 in fees paid by Level 3 are many times the revenue the company obtained from customers in the City. *Compare Municipality of Guayanilla*, 450 F.3d at 17 (invalidating five-percent fee on outgoing calls from municipality that would have reduced, but not eliminated, provider's profits). The burden imposed by the City's Ordinance is further heightened by the obligations to build conduits for the City and to indemnify the City even for its own negligence – provisions that bear no rational connection to the limited authority the Act reserves for local governments to provide non-discriminatory access to rights-of-way.

The conflict does not end there. The First, Second, and Tenth Circuits would also hold that the provisions of the Ordinance are not saved from preemption as "fair and reasonable compensation" under Section 253(c) because (as noted *supra*) it is undisputed that the fees bear no relationship to the City's own costs.

The Eighth Circuit also correctly recognized that its decision squarely conflicts with *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000). *See* Pet. App. 29a. The Sixth Circuit in that case held that a licensing fee is preempted if it exacts more than "fair and reasonable compensation" under Section 253(c), without regard to whether it amounts to an effective prohibition on telecommunications services under Section 253(a). *Id.* at 624. In this

case, the district court deemed the fee imposed by the Ordinance to be unreasonable because it bears no relationship to the City's own costs. Pet. App. 54a. The Eighth Circuit, by contrast, held that Section 253(a) was not implicated by the Ordinance and on that basis expressly pretermitted any inquiry into the reasonableness of the fee under Section 253(c).

2. These twin conflicts over the proper construction of Section 253 are intolerable. As noted *supra* at 19-20, the very purpose of the Telecommunications Act was to provide a uniform, deregulatory environment in which new competitors would not only enter markets for local and long-distance services, but also develop new markets for emerging telecommunications technologies that previously had been stifled by exclusionary regulation and charges. The current regime of inconsistent legal rules interpreting the statute's central preemption provision, however, encourages the further growth of a crazy quilt of local regulation, as providers within the Eighth and Ninth Circuits are subject to a litany of restrictions and fees on their operations. In contrast to the Eighth Circuit's ruling in this case, federal courts applying the majority reading of Section 253 "have invalidated local regulations in tens of cases across this nation's towns and cities." *County of San Diego*, 2008 U.S. App. LEXIS 19316, at *13.[5]

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[5] In addition to the rulings of the First, Second, and Tenth Circuit discussed in the text, see, *e.g.*, *Qwest Commc'ns Corp. v. City of New York*, 387 F. Supp. 2d 191, 193-94 (E.D.N.Y. 2005) (invalidating ordinance that gave the city unfettered discretion

As noted, Level 3's network alone reaches more than 100,000 miles in jurisdictions throughout the country. National and international telecommunications providers such as Level 3 face the significant burden of not merely complying with burdensome local rules but doing so in the face of

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to deny or revoke the franchise); *XO Missouri, Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 987 (E.D. Mo. 2003) (preempting under Section 253 a local law that was based on the St. Louis Ordinance challenged here); *TC Systems, Inc. v. Town of Colonie*, 263 F. Supp. 2d 471, 482-84 (N.D.N.Y. 2003) (following *TCG New York v. City of White Plains* and invalidating "almost identical" local ordinance and franchise agreement); *AT&T Commc'ns of the Southwest v. City of Dallas*, 8 F. Supp. 2d 582 (N.D. Tex. 1998) (granting preliminary injunction to AT&T when ordinance gave city unfettered discretion to deny application, and "place[d] conditions on a franchise for telecommunications services [not] related to the use of the rights of way, including onerous application and reporting requirements and provision of ducts and fiber to the city"), *vacated as moot by* 243 F.3d 928 (5th Cir. 2001); *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 814-15 (D. Md. 1999) (invalidating ordinance that required lengthy application, gave county unfettered discretion to deny or revoke the license, prohibited transfer and assessed fees), *vacated and remanded on other grounds* 212 F.3d 863 (4th Cir. 2000); *PECO Energy Co. v. Twp. of Haverford*, No. Civ. A 99-4766, 1999 WL 1240941, at *8-*9 (E.D. Pa. 1999) (preempting local ordinance that imposed a "Kafkaesque" application process and allowed unfettered discretion to deny the application); *see also Montgomery County Maryland v. Metromedia Fiber Network, Inc.*, 326 B.R. 483, 493 (S.D.N.Y. 2005) (upholding denial of claim for franchise fees owed by bankruptcy debtor because fees were demanded under a regulatory scheme that imposed significant application requirements on new entrants and was therefore preempted by Section 253).

conflicting interpretations throughout the country of whether those requirements are preempted by federal law. That result cannot be countenanced. As the Federal Communications Commission has opined, "[a] patchwork quilt of differing local regulations[,] may well discourage regional or national strategies by telecommunications providers, and thus adversely affect the economics of their competitive strategies." *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21,396, 21,442 (1997).

The importance of the question presented to telecommunications providers, local governments, and consumers is moreover manifest. Local jurisdictions nationwide have adopted restrictions and fees on the operations of telecommunications services. Level 3 and other telecommunications providers are presently litigating the lawfulness of many other such measures in numerous states.[6]

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[6] The many pending challenges to similar ordinances include *Qwest Corp. v. City of Portland*, No. 06-36022 (9th Cir.) (pending appeal of 2006 WL 2679543 (D. Or.) in which, on remand from 385 F.3d 1236 (9th Cir. 2004), the district court once again declined to preempt city ordinances relating to placement of fiber-optic networks); *and Qwest Commc'ns Corp. v. Maryland-National Capital Park & Planning Comm'n*, Second Amended Complaint, Case No. 8:07-cv-2199-RWT (D. Md. Oct. 6, 2008) (challenging linear-foot fees and licensing process unilaterally imposed by interjurisdictional park commission on existing network facilities on park land) (*see also* 533 F. Supp. 2d 572 (D. Md. May 16, 2008) (denying TRO)); *Qwest Corp. v. Elephant Butte Irrigation District of N.M.*, First Amended Complaint, Case No. 6:07-cv-163-MV/WDS (D.N.M. Nov. 15, 2007) (claiming Section 253 preempts unilateral fee

Only this Court's prompt intervention can resolve the proper construction of Section 253 and bring a close to this growing litigation.

In sum, had this case arisen in several other Circuits, the Ordinance would have been found preempted under the terms of the Telecommunications Act. Given the obvious importance of the question presented, certiorari should be granted.

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increases and other requirements imposed on fiber optic installation); *Verizon NY, Inc. v. City of Auburn*, Complaint, Case No. 5:08-cv-00308-GTS-GJD (N.D.N.Y. Mar. 18, 2008) (claiming city's attempt to unilaterally increase rent for use of city-owned conduit that was maintained by carrier constituted a violation of Section 253 in the absence of evidence that increased rent was related to city's costs); and *Verizon Northwest, Inc. v. City of Sandy*, Complaint, Case No. 3:08-cv-00587-MO (D. Or. May 15, 2008) (challenging city ordinance and resolution requiring relocation of above-ground network to underground, and requiring carrier to pay disproportionate share of costs and provide free services to city) ; *Level 3 Commc'ns v. City of Memphis*, Case No. Complaint, 2:06-cv-2547-BBD-tmp (W.D. Tenn. August 28, 2006) (pending case alleging preemption of city ordinance and franchise agreement under state and federal laws).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Rex S. Heinke
Michael C. Small
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067

Thomas C. Goldstein
Counsel of Record
Anthony A. Pierce
W. Randolph Teslik
Patricia A. Millett
Tobias E. Zimmerman
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

November 7, 2008

APPENDIX

APPENDIX A

Opinion for the United States Court of Appeals for the Eighth Circuit (September 4, 2008)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LEVEL 3 COMMUNICATIONS, L.L.C., Plaintiff-Appellant,

v.

CITY OF ST. LOUIS, MISSOURI, Defendant-Appellee,

City of St. Louis, Missouri, Plaintiff,

v.

Level 3 Communications, LLC, Defendant.

No. 07-3509.

Submitted: May 15, 2008.

Filed: Sept. 4, 2008.

Before LOKEN, Chief Judge, BEAM, and BYE, Circuit Judges.

BEAM, Circuit Judge.

In this licensing dispute with the City of Saint Louis, Level 3 appeals, challenging, among other

things, the district court's[1] denial of Level 3's motion to reopen discovery and the court's grant of summary judgment in the City's favor on the City's claim that neither the license agreement between the parties nor St. Louis City Revised Code Chapter 23.64 (the city ordinance) prohibits or effectively prohibits Level 3's ability to provide telecommunication services under 47 U.S.C. § 253(a). We affirm.

I. BACKGROUND

A. First Appeal

In 2004, Level 3 sued the City claiming that certain obligations in an agreement between the two parties violated state law; 42 U.S.C. § 1983; and the Federal Telecommunications Act of 1996, specifically 47 U.S.C. § 253.[2] Upon opposing motions for summary judgment, and accepting a mere possibility

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[1] The Honorable Charles A. Shaw, United States District Judge for Eastern District of Missouri.

[2] 47 U.S.C. § 253 reads, in pertinent part:

§ 253. Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

...

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

of prohibition standard of proof under section 253(a), the district court granted summary judgment in favor of Level 3. On appeal, this court determined that a plaintiff suing a municipality under the statute must show actual or effective prohibition under section 253(a), rather than the mere possibility of prohibition. *Level 3 Commc'ns L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 533 (8th Cir.2007)(*Level 3 I*). Based on the record developed by Level 3, we held that Level 3 failed to meet its burden under that standard. *Id.* at 534. In fact, Level 3 admitted in its response to interrogatories that it "[could not] state with specificity what additional services it might have provided had it been able to freely use the money that it was forced to pay to the City for access to the public rights-of-way."*Id.* at 533. Accordingly, we reversed the district court's grant of summary judgment in favor of Level 3 and remanded. *Id.* at 534-35.

B. Remand

After the remand, Level 3 asked the district court to reopen discovery so that it could gather further evidence of "actual or effective prohibition"-the "new standard set by the Eighth Circuit's mandate." The district court initially granted the request and the City filed an immediate motion for reconsideration and sought summary judgment in the City's favor on Level 3's section 253(a) claims. The City claimed that Level 3 had already conducted its discovery on the issue and could not bolster its position, in hindsight, through benefit of our remand. Level 3, on the other hand, claimed that our interpretation of section 253 was "new" and that it,

and the district court, had operated under a "misunderstanding" of what the section 253 requirements were, thus supporting Level 3's request to supplement its discovery responses.

The district court agreed with the City, holding that "[t]he Eighth Circuit spoke for the first time on an issue that has divided other courts, but it did not create a new standard." Thus, said the district court, Level 3's suggestion that it was completely caught off guard by the standard adopted by the circuit panel was not supported by the record. In fact, the court noted, during the prior discovery, the City requested that Level 3 provide evidence, by way of an interrogatory response, that it "had actually been" or "effectively [had been] prohibited from" providing services. Level 3 chose not to address that question.

In the initial action, as earlier stated, the parties argued two different controlling standards under section 253(a). The district court originally adopted Level 3's position, and we reversed, concluding that the position advocated by the City was correct. Upon remand, the district court ultimately agreed with the City, vacated its order granting Level 3's motion to reopen, and granted the City's motion for entry of summary judgment, noting that

> [i]t necessarily follows that the City was and is entitled to a grant of summary judgment on its claim for a declaration that, on the existing record, [which the district court ruled would not be expanded], neither Chapter 23.64 [of the City code] nor the license

agreement prohibits or effectively prohibits Level 3's ability to provide telecommunications services under § 253(a).

II. DISCUSSION

A. Discovery Motion

We review the district court's discovery ruling for "gross abuse of discretion" and the court's summary judgment ruling de novo. *Samuels v. Kansas City Missouri Sch. Dist.*, 437 F.3d 797, 801 (8th Cir.2006); *Sallis v. Univ. of Minn.*, 408 F.3d 470, 477 (8th Cir.2005). Review of district court discovery decisions is "very deferential" and "very narrow," making it a high hurdle for Level 3 to clear. *SDI Operating P'ship, L.P. v. Neuwirth*, 973 F.2d 652, 655 (8th Cir.1992). This is especially true where, as here, we agree with the district court's final legal position on the issue of summary judgment for the City.

Level 3 correctly points out that nothing in *Level 3 I* foreclosed the district court from reopening discovery. Indeed, our only instructions were "remand for further proceedings not inconsistent with this opinion." *Level 3 I*, 477 F.3d at 535. Even so, the district court did not grossly abuse its discretion by denying Level 3's request. In this regard, a major problem for Level 3 is that its legal obligations did not *change* as they did in many of the cases where remand occurred along with a mandate for further discovery to meet a new controlling standard that arose after the plaintiffs initiated their case. *See Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1033 (9th Cir.2004) (recognizing the new, higher standard for trademark

dilution claims adopted by the Supreme Court while the case was on appeal and remanding for further discovery directed at the new standard); *Blair v. Scott Specialty Gases,* 283 F.3d 595, 607-09 (3d Cir.2002) (applying, in the arbitration context, new Supreme Court precedent rendered while the matter was on appeal and remanding the case for limited discovery on newly adopted evidentiary burdens). All along, as Level 3 readily concedes, there were competing standards from which the court could choose regarding Level 3's burden on its section 253(a) claim. The fact that Level 3 made a strategic decision to litigate its case as if it were required to meet only the lower "may have the effect of prohibiting" test is not sufficient to warrant further discovery.[3]

Likewise inapposite is the line of cases cited by Level 3 for the proposition that when a trial court is reversed on grounds that it applied an incorrect legal standard, the general practice is to remand to the trial court for application of the correct legal standard to the evidence. *See Johnson v. California,* 543 U.S. 499, 515, 125 S.Ct. 1141, 160 L.Ed.2d 949

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[3] Level 3 methodically challenges each reason advanced by the district court for its decision not to reopen discovery. Level 3's arguments are unpersuasive. The district court correctly stated that the Eighth Circuit did not create a new standard, prudently denied Level 3 a second bite at the apple when Level 3 already had a chance to produce evidence satisfying the actual or effective prohibition standard (and was, in fact, directly asked to do so by the City in their interrogatories), and reasonably denied Level 3 the chance to introduce evidence on remand that arose after the close of initial discovery.

(2005); *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 238-39, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). We do not question the accuracy of this proposition but fail to see its applicability here. Such a course was taken in this case. Upon remand, the district court applied the correct legal standard to the evidence in the existing record, which evidence was adequate to decide the existing issue. This was not a gross abuse of its discretion.

B. Grant of Summary Judgment in Favor of the City

We review de novo a district court's grant of summary judgment, viewing the record in the light most favorable to the nonmoving party. *Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC,* 519 F.3d 466, 471 (8th Cir.2008). "[S]ummary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

Level 3 argues that the district court took a large leap in logic in deciding the case. We think not. The court simply held that "[i]t necessarily follow[ed]" from the reversal of summary judgment for Level 3 under the section 253(a) standard previously applied by the district court that the City was entitled to summary judgment "on its claim for a declaration that, on the existing record, neither [the city ordinance] nor the license agreement prohibits or effectively prohibits Level 3's ability to provide telecommunications services under § 253(a)."

Level 3 contends that the district court failed to discuss the factual bases of the City's summary judgment motion and further did not address how the

City's summary judgment motion fared under the "new" section 253(a) standard. Both claims miss the mark. The district court did, in fact, reference the substance of the City's summary judgment motion in the order. Further, it does "necessarily follow" that if Level 3 was unable to prove actual or effective prohibition under section 253(a), then the city ordinance and the parties' license agreement did not violate section 253(a). And this was the basis for the City's initial argument. Both determinations logically flow from our earlier remand reversing the district court's grant of summary judgment for Level 3.

Level 3 also fails in its argument that the district court's holding in this case creates some sort of general rule in a motion/cross-motion paradigm. The holding does not defy basic rules governing summary judgment proceedings. It is just uniquely true here that the denial of one summary judgment motion leads to the granting of the other because the parties' motions negate each other under the legal principles at work. We determined that Level 3, on the established record, failed to prove actual or effective prohibition-the crux of the determination for each motion before the district court. "After a thorough review of the entire record, we find insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations. Indeed, Level 3 claims it need not, and admits it has not, made such a showing." *Level 3 I*, 477 F.3d at 534. We have the same record before us today and Level 3 points to no material fact that could alter that legal determination.

III. CONCLUSION

For the reasons stated, we affirm.

APPENDIX B

Memorandum and Order of the United States District Court for the Eastern District of Missouri (September 25, 2007)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

LEVEL 3 COMMUNICATIONS, LLC, Plaintiff,

v.

CITY OF ST. LOUIS, MISSOURI, Defendant.

City of St. Louis, Missouri, Plaintiff,

v.

Level 3 Communications, LLC, Defendant.

Nos. 4:04-CV-871 CAS, 4:04-CV-1046 CAS.

Sept. 25, 2007.

MEMORANDUM AND ORDER

CHARLES A. SHAW, United States District Judge.

This matter is before the Court on the City of St. Louis, Missouri's (the "City") motion for reconsideration and to enter summary judgment in favor of the City. Level 3 Communications, LLC

("Level 3") opposes the motion. For the following reasons, the Court will grant the City's motion for reconsideration and will enter judgment in favor of the City.

BACKGROUND

This case concerns a dispute between the City and Level 3 over the terms, obligations, restrictions and fees set forth in a license agreement the City required Level 3 to execute before giving Level 3 access to streets and rights-of-way to install or maintain telecommunications facilities. The Court issued rulings on the parties' cross-motions for summary judgment on December 19, 2005, granting in part and denying in part both parties' motions. *Level 3 Commc'ns, LLC v. City of St. Louis, Mo.*, 405 F.Supp.2d 1047 (E.D.Mo.2005). To the extent relevant here, the Court granted Level 3's motion for summary judgment on its claims that the fee provisions of the license agreement and Chapter 23.64 of the City of St. Louis Revised Code violated § 253(a) of the Federal Telecommunications Act of 1996, 47 U.S.C. § 253(a). Correspondingly, the Court denied the City's motion for summary judgment on its claim for declaratory judgment that the license agreement and Chapter 23.64 did not prohibit or have the effect of prohibiting Level 3's ability to provide telecommunications services in the City under § 253(a).

On appeal, the Eighth Circuit Court of Appeals reversed the grant of summary judgment to Level 3 under 47 U.S.C. § 253(a).*Level 3 Commc'ns, L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 530 (8th

Cir.2007). The Eighth Circuit held that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition [of its ability to provide any interstate or intrastate telecommunications service], rather than the mere possibility of prohibition."*Id.* at 532.The Eighth Circuit concluded that Level 3 had failed to meet its burden of proof under § 253(a), *id.* at 533-34, and remanded the case "for further proceedings not inconsistent" with its opinion.*Id.* at 535.

Shortly after the Eighth Circuit's mandate was filed in this case, Level 3 filed a motion to reopen discovery and set a scheduling order. The Court granted this motion without giving the City an opportunity to respond. *See* Order of May 18, 2007 [Doc. 91]. The Court directed the parties to submit a joint written statement with respect to discovery and other issues remaining in the case. *Id.* On May 24, 2007, the City filed its motion for reconsideration of the Order of May 18, 2007, and for the entry of summary judgment in its favor on Level 3's § 253(a) claims.

DISCUSSION

A. Motion to Reconsider

1. The Parties' Positions

The City urges the Court to reconsider its order directing the parties to establish a proposed discovery schedule. The City states that Level 3 had a full opportunity under the Case Management Orders issued in this matter to conduct discovery and develop its case with respect to all issues, including the core issue of whether the City's ordinance

materially inhibits Level 3's ability to provide telecommunications services in the City. The City asserts that the mere fact Level 3 has been unable to establish it was materially inhibited from providing services in St. Louis does not mean it should have another opportunity to develop its case on remand. The City contends that to allow discovery at this juncture would be inefficient, unfair and would render meaningless the court-imposed discovery deadlines.

The City asserts that cases are not ordinarily remanded from appellate courts for the purpose of giving a party the opportunity to supply additional evidence to correct a deficiency in the evidence, citing *Moses Lake Homes, Inc. v. Grant County*, 276 F.2d 836, 853 (9th Cir.1960), *rev'd on other grounds,*356 U.S. 744 (1961), and *Rochez Bros., Inc. v. Rhoades,* 527 F.2d 891, 894-95 (3d Cir.1975). The City states that Level 3 made a tactical decision in its motion for summary judgment to focus its § 253(a) argument as a question to be decided purely as a matter of law, although the parties had over eight months of discovery to explore the issue and the existing record adequately addresses the question.

Specifically, the City states that Level 3 alleged in its complaint that the challenged City Ordinance and license agreement prohibited or had the effect of prohibiting Level 3 from providing service in the City of St. Louis, Amended Complaint ¶¶ 50-51, 53-54, and the City directed interrogatories and requests for admission to Level 3 on the issue of whether there was any impact on Level 3's ability to provide service. The City thus contends that both parties were aware a key issue in the case was

whether Level 3 was actually or effectively being prohibited from providing telecommunications services in St. Louis. The City asserts that while it focused its discovery on this issue, Level 3 chose not to, and should not be permitted to revisit it now. The City states that allowing additional discovery would only unnecessarily prolong this litigation, citing *E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*, 711 F.Supp. 1205, 1212 n. 24 (D.Del.1989) ("While Phillips naturally would like to bolster its position now with its hindsight benefited by this Court's earlier opinion and that of the Federal Circuit, free permission of this practice would result in endless litigation.").

Level 3 responds that further proceedings and supplemental discovery would be entirely consistent with the Eighth Circuit's opinion. Level 3 asserts that it "prosecuted its case according to a standard that was universally recognized to establish that the City prohibited [it] from providing telecommunications services under § 253," but "the Eighth Circuit set forth a new interpretation of the statute" in its opinion. Opp. at 2. Level 3 states that based on its "past misunderstanding" of the Eighth Circuit's treatment of § 253 claims, and because it has acquired new evidence in the nearly two years since discovery closed, the Court should provide it with an opportunity to supplement its discovery responses in order to meet the "new, heightened standard" to establish § 253(a) liability. Opp. at 2, 3.

Level 3 argues that the cases cited by the City actually support Level 3's position, because these cases acknowledge that discovery may be reopened where the prior litigation and the court's decision

have been based on a misunderstanding. Level 3 states that in *Moses Lake Homes,* for example, the Ninth Circuit decided that on remand the parties should be able to supplement the record because "the deficiency result[ed] from a misunderstanding, apparently shared by the trial court, as to the meaning of [the statute]."276 F.3d at 853.Level 3 states that in *Rochez Bros,* the Third Circuit stated, "An appellate court may remand to permit more evidence to be introduced when the deficiency of proof results from a misunderstanding among the parties and the trial court."527 F.2d at 894-95.Level 3 contends that it should be entitled to a reasonable opportunity to supplement the record on remand because it and this Court "misunderstood that the Eighth Circuit would apply a new standard to find liability under § 253."Opp. at 6.

Finally, Level 3 contends that the City's request for the entry of summary judgment is procedurally and substantively inappropriate because the Eighth Circuit neither reversed nor addressed this Court's denial of the City's motion for summary judgment. Level 3 asserts that the City's motion for summary judgment is premature because no motions are currently pending, as the City has yet to file a new motion for summary judgment or renew its prior one.

2. Analysis

The Eighth Circuit did not remand this case with directions that the Court take additional evidence concerning Level 3's § 253(a) claims. Rather, the Eighth Circuit remanded "for further proceedings

not inconsistent" with its opinion. *Level 3,* 477 F.3d at 535. As a result, this Court has the discretion to determine whether Level 3's motion to reopen discovery should be granted. See *Walling v. Jacksonville Paper Co.,* 317 U.S. 564, 572, 63 S.Ct. 332, 87 L.Ed. 460 (1943) (where the district court improperly interpreted and applied the controlling law in the case but did not restrict the introduction of evidence relevant to that point of law, whether additional evidence must be taken on remand is a question for the district court); *Rochez Bros.,* 527 F.2d at 894 (where appellate court did not instruct the district court to take further evidence, the question of opening the record for additional evidence was left to the discretion of the trial court); cf. *Hawkeye Commodity Promotions, Inc. v. Vilsack,* 486 F.3d 430, 443 (8th Cir.2007) (motion to reopen the evidence to submit additional proof rests in the trial court's discretion) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 331, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971)).

It is well established that a party who fails to introduce at trial all evidence necessary to obtain judgment has generally made a fatal error. See, *e. g., Castaneda v. Partida,* 430 U.S. 482, 497-500, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Dothard v. Rawlinson,* 433 U.S. 321, 331, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977); *Gathright v. St. Louis Teacher's Credit Union,* 97 F.3d 266, 268 (8th Cir.1996); *Natural Resources Defense Council, Inc. v. Texaco Refining & Mktg., Inc.,* 2 F.3d 493, 504 (3d Cir.1993); *Youngstown Sheet & Tube Co. v. Lucey Prods. Co.,* 403 F.2d 135, 139 (5th Cir.1968). This rule applies equally here, where the case was decided on the parties' cross-motions for

summary judgment, and the parties had fully developed the facts and issues and were expecting the Court's ruling on the motions to resolve the case. Cases are not ordinarily remanded to give a party the opportunity to supply missing evidence. *Rochez Bros.*, 527 F.2d at 894;*Moses Lake Homes,* 276 F.2d at 853. The Court in the exercise of its discretion finds that Level 3 has failed to establish that an exception to the general rule applies here.

The Court disagrees with Level 3's contention that the Eighth Circuit established a new standard of interpretation of § 253(a), replacing a "standard that was universally recognized." The Eighth Circuit spoke for the first time on an issue that has divided other courts, but it did not create a new standard. The standard adopted by the Eighth Circuit, requiring evidence of an actual or effective prohibition under § 253(a), is the standard promulgated by the Federal Communications Commission in *In re California Payphone Ass'n*, 12 F.C.C.R. 14,191, 14,206 ¶ 31 (1997). This standard has been adopted by other courts. See *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir.2002) (adopting FCC test and preempting ordinance after finding that TCG was kept out of market for more than 18 months during franchise negotiations); *Tel Comm Techs. v. City of New Haven, Ct.*, 2006 WL 2349544, *8 (D.Conn.2006) (evidence did not show that ordinances "materially inhibited" plaintiff's ability to provide service).

Level 3's suggestion that it was completely caught off guard by the standard adopted by the Eighth Circuit is not supported by the record. The record shows that during discovery, the City

requested that Level 3 provide evidence that it had actually been or effectively prohibited from providing services, and Level 3 did attempt to show evidence of an actual or effective prohibition to this Court and the Eighth Circuit. *See*City's Mot. to Reconsider at 4-6. Finally, the standard adopted by the Eighth Circuit was argued by the City in its motion for summary judgment, along with citation to relevant authority. *See*City's Mot. Summ. J. at 8, 9 [Doc. 53]

The cases on which Level 3 relies are distinguishable. Unlike the instant case, the courts of appeal in *Rochez Bros.* and *Moses Lake Homes* remanded with directions for the district courts to take additional evidence. In *Rochez Bros.,* the plaintiff failed to introduce adequate evidence to permit an accurate determination of damages for certain restricted stock. The Third Circuit noted the rule that failure to introduce into evidence all the proof necessary to sustain a judgment is generally fatal, but concluded that a remand for additional evidence was necessary to "insure substantial justice" because injury had been shown and liability conclusively established but there was no basis in the record for "an intelligent estimate" of damages. 527 F.2d at 894-95.In contrast, in the instant case Level 3 has not established injury or liability, and therefore substantial justice does not require that the case be reopened.

In *Marsh Lake Homes*, the Ninth Circuit had to determine whether a county could enforce its claim for personal property taxes against deposits of estimated compensation due to leaseholders of the United States based on condemnation of their leasehold interests. 276 F.2d 836. The Ninth Circuit

determined that the tax claim should have been allowed with respect to tax years 1955 through 1957 and denied as to tax year 1959, but found the record could not support the trial court's disallowance of the claim as to tax year 1958. *Id.* at 853.The court stated the general rule that a case is not remanded to give a party the opportunity to correct a deficiency in its evidence, but concluded an exception should apply because the deficiency stemmed from a misunderstanding of the relevant statute by the trial court and the parties, and from the plaintiff's forced reliance on a defective designation by the Secretary of the Air Force, a key piece of evidence for which plaintiff was not responsible. *Id.*

This case is distinguishable from *Marsh Lake Homes* because here there was no mutual misunderstanding of the Court and parties. Rather, the parties argued two different controlling standards under § 253(a), this Court adopted Level 3's position, and the Eighth Circuit reversed, concluding that the position advocated by the City was correct. In this case, all of the relevant evidence with respect to whether Level 3 was actually or effectively prohibited from providing telecommunications services was within its control, and was presented to this Court and the Eighth Circuit. Level 3 has not described any additional evidence that it could have produced during discovery that has now been made relevant by the Eighth Circuit's decision. The only "new evidence" that Level 3 describes is evidence that it states arose after the close of discovery in this case, relating to new companies it has purchased and new enhanced services it is attempting to offer. Opp. at 6.

Under these circumstances, the Court finds that Level 3 is essentially trying to start a new lawsuit within the framework of this case. Level 3 had the opportunity to present its case on the record as it exists. To reopen the case and permit additional discovery under these circumstances would be inefficient and render meaningless the discovery deadlines previously imposed. For these reasons, the Court finds that discovery in this case should not be reopened. The Court will therefore grant the City's motion to reconsider the order granting Level 3's motion to reopen discovery, and will vacate the same.

B. Motion for Entry of Summary Judgment

The City moves for the entry of summary judgment in its favor based on its motion for summary judgment filed on August 5, 2005, the briefs supporting and opposing that motion, and the record in this case. Mot. for Reconsideration and the Entry of Summ. J. at 1-2. The City seeks a declaration that the license agreement and Chapter 23.64 do not "prohibit or have the effect of prohibiting" Level 3's ability to provide telecommunications service in the City under § 253(a). The City asserts that its request is not premature, as argued by Level 3, because the parties had filed cross-motions for summary judgment on the § 253(a) issue. The Court granted Level 3's motion on the issue and denied the City's. Because the Eighth Circuit reversed the grant of summary judgment in favor of Level 3, on the same record, the City contends that the only course of action left is for the Court to enter judgment in its favor, because "if Level 3 loses on its claim that there is a violation of Section

253(a), then the City must prevail on its claim that there is no violation as a matter of law."Reply at 8.

The Court agrees with the City. Level 3 and the City filed cross-motions for the Court to rule on the § 253(a) claims on a summary judgment basis, and had a full and fair opportunity to develop the record to support their claims. The Eighth Circuit ruled that this Court's entry of summary judgment in favor of Level 3 was improper, as Level 3 did not meet its burden to establish that Chapter 23.64 or the license agreement actually or effectively prohibited or materially inhibited its ability to provide telecommunications services, and thus did not show a § 253(a) violation as a matter of law. It necessarily follows that the City was and is entitled to a grant of summary judgment on its claim for a declaration that, on the existing record, neither Chapter 23.64 nor the license agreement prohibits or effectively prohibits Level 3's ability to provide telecommunications services under § 253(a). The City's motion for entry of summary judgment in its favor, which renews the City's prior motion for summary judgment, should therefore be granted.

CONCLUSION

For the foregoing reasons, the Court will grant the City's motion to reconsider the prior Order of May 19, 2007, will vacate that Order, and will grant the City's motion to enter summary judgment in its favor for a declaration that, on the existing record, neither Chapter 23.64 nor the license agreement prohibits or effectively prohibits Level 3's ability to provide telecommunications services under § 253(a).

Accordingly,

IT IS HEREBY ORDERED that the City of St. Louis, Missouri's motion for reconsideration is **GRANTED.**[Doc. 92]

IT IS FURTHER ORDERED that upon reconsideration, Level 3 Communications, LLC's motion to reopen discovery and set scheduling order is **DENIED.**[Doc. 90]

IT IS FURTHER ORDERED that the Court's Order of May 19, 2007, reopening discovery in this case, is **VACATED.**[Doc. 91]

IT IS FURTHER ORDERED that the City of St. Louis, Missouri's motion for summary judgment is **GRANTED** with respect to its claim for declaratory judgment that, on the existing record, neither the license agreement between the parties nor St. Louis City Revised Code Chapter 23.64 prohibits or effectively prohibits Level 3's ability to provide telecommunications services under 47 U.S.C. § 253(a). [Doc. 53]

An appropriate judgment will accompany this memorandum and order.

APPENDIX C

Opinion of the United States Court of Appeals for the Eighth Circuit (February 5, 2007)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LEVEL 3 COMMUNICATIONS, L.L.C., Appellee/Cross-Appellant,

v.

CITY OF ST. LOUIS, MISSOURI, Appellant/Cross-Appellee,

Missouri Chapter of the National Association of Telecommunications Officers and Advisors; National Association of Telecommunications Officers and Advisors; International Municipal Lawyers Association; Local Government Lawyer's Roundtable, Amici on behalf of Appellant/Cross-Appellee,

Southwestern Bell Telephone L.P., doing business as AT & T Verizon Telephone Companies; MCImetro Access Transmission Services, LLC, doing business as Verizon Access Transmission Services, Amici on behalf of Appellee/Cross-Appellant.

Nos. 06-1398, 06-1459

Submitted: Oct. 16, 2006

Filed: Feb. 5, 2007

Before MELLOY, BEAM, and BENTON, Circuit Judges.

BEAM, Circuit Judge.

This case involves a telecommunications licensing agreement that requires Level 3 Communications (Level 3) to pay fees and meet other obligations before accessing streets and rights-of-way owned or controlled by the City of St. Louis (City or St. Louis). The parties appeal and cross-appeal the district court's rulings on cross-motions for summary judgment. We reverse the district court's grant of summary judgment to Level 3 under 47 U.S.C. § 253(a), affirm the denial of summary judgment on Level 3's section 1983 claim, and do not reach the other statutory and non-statutory claims asserted by the parties.

I. BACKGROUND

In April of 1999, Level 3 and St. Louis entered into the licensing agreement (the Agreement). The Agreement incorporates by reference the terms of St. Louis City Revised Code Chapter 23.64, which allows the City to regulate the process and procedures by which a telecommunications entity may occupy the streets and public rights-of-way within the City. The portions of Chapter 23.64 incorporated into the Agreement require Level 3, among other things, to submit an application for licensure, to apply for amendments to the license, to provide and install municipal service conduits within a common trench upon request, to maintain a performance bond for the

City's benefit, to maintain liability insurance in the amount of at least $500,000, to indemnify the City for any negligence of City employees in any way connected with Level 3's communications system, and to employ only City-approved contractors for work on network facilities installed under the license.

The Agreement also allows the City to charge Level 3 an annual licensing fee. The amount charged-the footage fees-is calculated annually based upon not only the number of linear feet of conduit installed by Level 3 within the City but also the number of active conduits within each linear-foot. The amount charged per foot also varies yearly to adjust for inflation.

In late July 2003, Level 3 refused to continue paying the footage fees due under the Agreement. Litigation ensued. Level 3 filed suit against the City seeking a declaration that the Agreement's obligations, both fee and non-fee related, violated state law, 42 U.S.C. § 1983, and the Federal Telecommunications Act of 1996, specifically, 47 U.S.C. § 253. The City also filed a declaratory judgment action asking that the Agreement be found valid under state and City law, and that the court compel Level 3 to comply with the contract. The district court consolidated the cases. The parties filed cross-motions for summary judgment, resulting in the district court order now before us.

The district court held the footage fees valid under state law and found no cause of action under 42 U.S.C. § 1983. The court then addressed the

alleged violation of 47 U.S.C. § 253.[4] While Level 3 admitted that it could point to no services it had been unable to provide to date because of the Agreement, the court found that Chapter 23.64, as incorporated into the Agreement, "includes several provisions that 'in combination' 'have the effect of prohibiting' the ability to provide telecommunications services under 47 U.S.C. § 253(a)."

Having concluded that Chapter 23.64 as a whole violated section 253(a), the court then went on to determine whether the safe harbor provision of section 253(c) saved any of the individual provisions incorporated into the Agreement. The court found that the non-fee requirements, such as the application, common conduit trench, indemnity,

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[4] 47 U.S.C. § 253 reads, in pertinent part:

§ 253. Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

....

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

bond, and certified contractor obligations were reasonable public safety requirements related to the management of public rights-of-way and thus valid under section 253(c). However, the court found that for the linear-foot fee to meet the definition of "fair and reasonable compensation" it "must be directly related to the actual costs incurred by the City when a telecommunications provider makes use of the rights-of-way." Because the City offered no evidence that the fees had "any relation to the City's costs in managing, inspecting, and maintaining its rights-of-way," the court held that they did not qualify as "fair and reasonable compensation" under section 253(c).

II. DISCUSSION

Though various district courts in this circuit have construed section 253, we have yet to do so. The language and structure of section 253 has, to understate the matter, "created a fair amount of confusion." *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235, 240 (3d Cir.2002). Therefore, before engaging in a review of the district court's final judgment, we will delineate the relationship between sections 253(a) and 253(c), and establish who has the burden of proof when a violation of section 253(a) is being considered.

A. The Relationship Between Sections 253(a) and 253(c)

Subsection (a), a rule of preemption, articulates a reasonably broad limitation on state and local governments' authority to regulate telecommunications providers. Subsection (c) begins with the phrase "Nothing in this section affects" and then enumerates various protected state and local government acts. Thus, section 253(a) states the general rule and section 253(c) provides the exception-a safe harbor functioning as an affirmative defense-to that rule. *Id.; BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187 (11th Cir.2001).

We write on this point to make it clear that only after "the party seeking preemption sustains its burden of showing that a local municipality has violated Section 253(a) by formally or effectively prohibiting entry into the [telecommunications services] market [does] the burden of proving that the regulation comes within the safe harbor in Section 253(c) fall[ ] on the defendant municipality." *New Jersey Payphone*, 299 F.3d at 240 (citation omitted).

We acknowledge that others disagree with our understanding of subsection (c)'s role in section 253. Level 3, in its amended complaint, correctly states that section 253(a) limits the ability of state and local governments to regulate, but then suggests that section 253(c) also limits the ability of state and local governments to regulate their rights-of-way or charge "fair and reasonable compensation." In a broad sense this may be true, but only if the challenged regulation violates section 253(a). Further, the Sixth Circuit, in *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir.2000), found that the challenged fee did not violate section 253(a), and then, nonetheless,

proceeded to analyze the fee under section 253(c), despite that section's clear role as an exception to section 253(a)'s general rule.

We disagree with the approach taken by the Sixth Circuit because section 253(c) is not self-sustaining. The language of section 253(c) following the phrase "No thing in this section affects" "derives meaning only through its relationship to (a)." *BellSouth Telecomms.*, 252 F.3d at 1187-88. Indeed, section 253(c), standing alone, "cannot form the basis of a cause of action against a state or local government." *Id.* at 1189. Thus, requiring proof of a violation of subsection (a) before moving to subsection (c) is the only interpretation supportable by a plain reading of the section as a whole.

B. Burden of Proof Required to Show a Violation of Section 253(a)

Having held that a violation of section 253(a) is a prerequisite to section 253(c) analysis, we now address what a plaintiff must establish to support a violation of section 253(a).

Section 253 (a) states: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Under a plain reading of the statute, we find that a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition. We again acknowledge that other courts hold otherwise and

suggest that *possible* prohibition will suffice. *Qwest Commc'ns Inc. v. City of Berkeley,* 433 F.3d 1253, 1256 (9th Cir.2006); *Qwest Corp. v. City of Portland,* 385 F.3d 1236, 1239 (9th Cir.2004), *cert. denied,*544 U.S. 1049, 125 S.Ct. 2300, 161 L.Ed.2d 1089 (2005); *Qwest Corp. v. City of Santa Fe,* 380 F.3d 1258, 1270 n. 9 (10th Cir.2004); *City of Auburn v. Qwest Corp.,* 260 F.3d 1160, 1175 (9th Cir.2001); *see also Puerto Rico v. Municipality of Guayanilla,* 450 F.3d 9, 18 (1st Cir.2006); *Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd.,* 189 F.3d 1, 9 (1st Cir.1999).

We disagree with the approach of our sister circuits because they reach a conclusion contrary to a complete analysis of the section. Examination of the entirety of section 253(a) reveals the subject of the sentence, "[n]o State or local statute or regulation, or other State or local legal requirement" is followed by two discrete phrases, one barring any regulation which prohibits telecommunications services, and another barring regulations achieving effective prohibition. However, no reading results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services, as our sister circuits seem to suggest. By inserting the word "that" before "may," as one circuit has done, *Puerto Rico v. Municipality of Guayanilla,* 450 F.3d at 18 (1st Cir.2006), or by creative quotation, as another circuit has found convenient, *e.g., Qwest Corp. v. City of Portland,* 385 F.3d at 1239 (9th Cir.2004), the most precise meaning of section 253(a) has been distorted.

When the language of a statute is clear, as we believe is the case with section 253(a), our only duty is to enforce the enactment according to its terms.

E.g., Lamie v. United States Trustee, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). Thus, we hold that a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition. The plaintiff need not show a complete or insurmountable prohibition, *see TCG New York, Inc. v. City of White Plains,* 305 F.3d 67, 76 (2d Cir.2002), but it must show an existing material interference with the ability to compete in a fair and balanced market. *Cal. Payphone Ass'n,* 12 F.C.C.R. 14,191, 14,206, 1997 WL 400726(FCC) ¶ 31 (July 17, 1997).

C. Summary Judgment on Section 253(a)

Having determined what evidence is necessary to bring a successful section 253(a) claim, we now turn to the district court's order. We begin with the district court's grant of summary judgment in favor of Level 3 on the question of whether the City's ordinance violates section 253(a).

When reviewing a grant of summary judgment, we review the district court's decision de novo, examining the facts in a light most favorable to the non-moving party. *Martin v. E-Z Mart Stores, Inc.,* 464 F.3d 827, 829 (8th Cir.2006). Under Federal Rule of Civil Procedure 56(c), summary judgment is only appropriate when the moving party shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." We will thus find that Level 3 is entitled to summary judgment only if it has carried its burden of showing that there exists no genuine

issue of material fact as to whether the City's ordinance actually or effectively prohibited or materially inhibited Level 3's ability to provide telecommunications services, and that it is entitled to judgment as a matter of law.

Level 3's own motion for summary judgment answers this inquiry. Level 3 claims "[t]he proper focus of a threshold § 253(a) inquiry ... is the *scope* of the regulatory authority that a city purports to wield-not whether the city has used that authority to *actually* exclude a provider or service." Level 3 further admits in its response to interrogatories that it "cannot state with specificity what additional services it might have provided had it been able to freely use the money that it was forced to pay to the City for access to the public rights-of-way." This admission establishes that Level 3 has not carried its burden of proof on the record we have before us.

Without looking for actual or effective prohibition, and despite Level 3's own admissions on these matters, the district court summarily held that Chapter 23.64, incorporated into the Agreement, "includes several provisions that 'in combination' 'have the effect of prohibiting' the ability to provide telecommunications services under 47 U.S.C. § 253(a)."

We disagree. After a thorough review of the entire record, we find insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations. Indeed, Level 3 claims it need not, and admits it has not, made such a showing. Further, because Level 3 has not carried its burden of establishing a violation

under section 253(a), the district court's section 253(c) analysis was premature.[5]

FN2. As discussed above, because Level 3 shows no violation under section 253(a), any safe harbor analysis urged by St. Louis under section 253(c) is premature. We therefore do not reach the district court's analysis of the footage fees as "fair and reasonable compensation."

D. Summary Judgment on Section 1983 Claim

In its amended complaint, Level 3 sought damages under section 1983, claiming that section 253 conferred rights on Level 3 as an intended beneficiary and that the City violated Level 3's rights under the statute. The district court denied summary judgment, holding that "Level 3 has not met its burden to demonstrate that the Act confers a federal right on it." Again, we review de novo a denial of a motion for summary judgment. *Martin*, 464 F.3d at 829.

Level 3, as a section 1983 plaintiff, bears the burden of establishing that "the claim actually involves a violation of a federal right, as opposed to a

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[5] As discussed above, because Level 3 shows no violation under section 253(a), any safe harbor analysis urged by St. Louis under section 253(c) is premature. We therefore do not reach the district court's analysis of the footage fees as "fair and reasonable compensation."

violation of a federal law." *Ark. Med. Soc'y, Inc. v. Reynolds,* 6 F.3d 519, 523 (8th Cir.1993). More specifically, "the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which [it] belongs." *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 120, 125 S.Ct. 1453, 161 L.Ed.2d 316 (2005).

Circuits are split on whether section 253 creates a right enforceable through a section 1983 action. *Compare Qwest Corp. v. City of Santa Fe,* 380 F.3d 1258, 1265 (10th Cir.2004) (finding Congress did not intend to create a private right of action in section 253), *with BellSouth Telecomms., Inc. v. Town of Palm Beach,* 252 F.3d 1169, 1191 (11th Cir.2001) (finding a private right of action to seek preemption of state regulations purporting to manage public rights-of-way); *TCG Detroit v. City of Dearborn,* 206 F.3d 618, 624 (6th Cir.2000) (finding that section 253 creates a private right of action for parties aggrieved by a municipality's unfair rates). However, *Arkansas Medical Society* makes clear that the claim must involve not only an enforceable right, but also a violation of that right. 6 F.3d at 523. We refrain from joining the fray over whether section 253 creates a private right of action because, as we held above, Level 3 has shown no violation of section 253, whether or not that section creates an enforceable right. Thus, the district court did not err by denying summary judgment on the section 1983 claim.

III. CONCLUSION

For the reasons stated above, we reverse the district court's grant of summary judgment in favor of Level 3 on the issue of whether the City's regulatory scheme violates 47 U.S.C. § 253(a), affirm the denial of summary judgment on Level 3's section 1983 claim, and remand for further proceedings not inconsistent with this opinion.

APPENDIX D

Memorandum and Order of the United States District Court for the Eastern District of Missouri (December 19, 2005)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

LEVEL 3 COMMUNICATIONS, LLC, Plaintiff,

v.

CITY OF ST. LOUIS, MISSOURI, Defendant.

City of St. Louis, Missouri, Plaintiff,

v.

Level 3 Communications, LLC Defendant.

Nos. 4:04-CV-871 CAS, 4:04-CV-1046 CAS

Dec. 19, 2005

MEMORANDUM AND ORDER

SHAW, District Judge.

Plaintiff Level 3 Communications, LLC ("Level 3") filed suit against the City of St. Louis ("City") seeking a declaration that the terms, restrictions, obligations and fees established by the Communications Transmission System License Agreement ("License

Agreement") between Level 3 and the City violates the Federal Telecommunications Act of 1996, ("FTA" or "Act"), 47 U.S.C. § 253, 42 U.S.C. § 1983, and state law. The City then filed a declaratory judgment action against Level 3 asserting that the compensation provisions of the License Agreement are valid and binding under state and City law, and that Level 3 must comply with that provision as long as it occupies the City's rights-of-ways.

The Court consolidated the cases into the above-styled case, and the matter is now before the Court on cross-motions for summary judgment. The motions are fully briefed. The Court will grant the motions in part and deny the motions in part for the reasons set forth below.

I. BACKGROUND

On March 8, 1991, the City enacted Chapter 23.64 ("chapter 23.64" or "Ordinance") for the purpose of regulating the process and procedures by which an entity seeking to construct, operate, use, replace, reconstruct or maintain telecommunications facilities that would occupy the streets, public ways and/or public places within the City. Chapter 23.64 requires all such entities to enter into a license agreement with the City of St. Louis Board of Public Service ("BPS"), and that such licenses expressly incorporate the requirements of Chapter 23.64 by reference. *See* 23.64.040. On April 13, 1999, Level 3 entered into the License Agreement with the City. The License Agreement contains several compensation provisions. The License Agreement

incorporates by reference the terms of Chapter 23.64.

Chapter 23.64 requires in pertinent part:

> A. The licensee shall submit an application for licensure to include, the name, address and telephone number of the applicant; the legal status of the applicant; the name address and telephone number of a responsible person whom the city may notify or contact at any time concerning the communications transmission system; an engineering site plan showing the proposed location of the communications transmission system, including any manholes or overhead poles, the size, type and proposed depth of any conduit or other enclosures, and the relationship of the system to all existing streets, sidewalks, poles, utilities, and other improvements within the public streets; minimal technical standards which the licensee proposes to follow in construction of the licensed system; diameter and projected length of the communication aerial or conduit; and any additional information which the Agency may require, subject to the approval of the Board of Public Service, see, 23.64.050(A)-(B);
>
> B. The licensee shall submit an application to amend the license whenever any licensee wishes to expand its facilities, see, 23.64.050(D);

C. The licensee shall obtain any permits required to execute such construction required under City ordinances or regulations issued by any of the City's agencies or departments.

D. The license agreement shall specify that the Licensee shall provide and install in a common trench with the conduit of the Licensee a municipal service conduit(s) if requested and specified by the Board of Public Service, see, 23.64.80(G);

. . . . .

The Agency shall reduce subsequent license charges due under the license by an amount equal to the additional charge of the Licensee of the conduit, pull boxes, vaults, other materials and additional construction work, other than the cost of the trenching itself, incurred as a result of construction of the municipal service conduit, see, 23.64.80(G);

E. To maintain a performance bond for the benefit of the City, see, 23.64.120(A);

F. To obtain and maintain a liability insurance policy of at least $500,000 per incident with the city named as an additional insured party, see, 23.64.130(C);

G. To indemnify the City for all claims, including damages caused by or arising out of any act or negligent omission of the City or its agents, "arising out of or in any way connected with the installation use, operation, maintenance or condition of the Licensee's communications transmission system," see, 23.64.130(B);

H. To use only contractors who have been licensed by the City in constructing, installing, or maintaining private network facilities installed under the license, see 23.64.140(D);

I. The Licensee keep accurate, complete and current maps and records of its system and facilities which occupy the streets, public ways and public places within the City and shall furnish as soon as they are available three (3) complete copies of such maps and records to the agency, see 23.150(I);

J. A license issued pursuant hereto shall not be transferred without the prior written authorization of the Board of Public Service, see 23.64.170.

In addition, the Ordinance allows the City:

A. To revoke a license and cancel the underlying license agreement if the licensee violates the terms of that agreement or this chapter, see, 23.64.080(C);

B. To establish minimum technical standards and specifications which licensees must adhere to in installing their network facilities, 23.64.140(A).

In addition to the above terms and requirements, chapter 23.64 establishes an annual license fee that Level 3 must pay to the City. The license charge is calculated on the basis of the number of linear feet of conduit installed within the City, and the number of conduits within each linear-foot that carry live (activated) fiber optic cable. In the first year of the License Agreement, Level 3 paid license charges that ranged from $1.72 to $3.45 per linear foot, depending on the number of Level 3's conduits that were in use. Each year the license charges are recalculated based on the amount of Level 3's conduit in use and are automatically adjusted by the cost of inflation, as measured by the Consumer Price Index. The fee varies depending on the type of installation-aboveground or underground-and the diameter of the installed conduit. *See* 23.64.090.

In addition to the conditions imposed by Chapter 23.64, which are incorporated into the License Agreement by reference, the License Agreement provides:

A. Level 3's system shall be used as a "competitive access provider" telecommunications system only, see, ¶ 2(B);

B. Level 3 shall obtain separate permits or authorizations required under any City ordinance or regulation for the construction, installation, operation, maintenance or use of its network facilities, see, ¶ 7(A);

C. Level 3 must provide and maintain a performance bond of $100,000 throughout construction and installation of its network facilities, conditioned on Level 3's faithful performance of all obligations under the License Agreement. Following construction and/or installation, Level 3 must provide and maintain a performance bond in the amount of $25,000, conditioned on Level 3's faithful performance of all obligations under the License Agreement. Such bonds to be solely for the benefit of the City and in a form approved by the City Counselor, see, ¶ 9(A);

D. Level 3 must maintain, during the term of the License Agreement, continuous uninterrupted general insurance under a policy or policies which provide coverage on all facilities installed, constructed, maintained, operated or used by or on behalf of Level 3 and on all of the activities of Level 3 and its employees or contractors within the geographic area covered by the License

Agreement. Such policy or policies must provide no less than $1,000,000 per person and $1,000,000 per incident personal injury liability coverage and $1,000,000 property damage liability coverage, and must name the City as an additional insured party, see, ¶ 8(D);

E. Level 3 must provide the City with copies of all tariffs or other documents filed with the Missouri Public Service Commission or the Federal Communications Commission which pertain to the City of St. Louis or the License Agreement, and any other documents that the City might request, see, ¶ 12;

F. Level 3 obtain prior written consent of the City before any assignment or transfer of ownership in the License Agreement unless Level 3 remains solely responsible for installing, maintaining, replacing and removing all facilities in the Project, see, ¶ 13.

On or about July 28, 2003, Level 3 stopped paying the fees due under the License Agreement and stated that it would not pay the future fees required under the License Agreement.

The City claims the Level 3 owes it damages through and including the date of the Agreement, the period from July 1, 2003 through June 30, 2004, plus penalty and interest charges which continue to accrue.

In support of its motion for summary judgment, Level 3 argues the City has impermissibly impaired the ability of telecommunications companies, like itself, to provide interstate and intrastate telecommunications services. Level 3 argues the burdens imposed by the City, including an excessive non-cost based fee for access to the public rights of way, far exceed the City's narrowly limited authority under state and federal law to regulate telecommunications companies such as Level 3. Level 3 insists the City's ordinance here is identical to the ordinance struck down in *XO Missouri v. City of Maryland Heights,* 256 F.Supp.2d 987, 999 (E.D.Mo.2003), which Chief Judge Carol Jackson of this district found to be onerous.

The City argues that Level 3 fails to show that any of the provisions of Chapter 23.64 or the License Agreement actually prohibit or have the effect of prohibiting Level 3 or anyone else from providing telecommunications services. The City further argues that the Ordinance does not contain many of the onerous provisions contained in the Maryland Heights ordinance that Judge Jackson found to be prohibitory. Moreover, the City claims the linear foot fee it imposes is both fair and reasonable and is imposed on all similarly-situated entities on a competitively neutral and nondiscriminatory basis, and therefore must be upheld.

II. DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be

entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment, the court is required to view the facts in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the underlying facts. *AgriStor Leasing v. Farrow,* 826 F.2d 732, 734 (8th Cir.1987). The moving party bears the burden of showing both the absence of a genuine issue of material fact and his entitlement to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); Fed.R.Civ.P. 56(c).

Once the moving party has met his burden, the non-moving party may not rest on the allegations of his pleadings but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists. Fed.R.Civ.P. 56(e). *Anderson,* 477 U.S. at 257, 106 S.Ct. 2505; *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 273-74 (8th Cir.1988). Rule 56"mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Additionally, this Court is " 'not required to speculate on which portion of the

record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim.' " *White v. McDonnell Douglas Corp.*, 904 F.2d 456, 458 (8th Cir.1990) (quoting *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir.1989)).

The Telecommunications Act was enacted to promote competition among, and reduce regulation of, telecommunications providers. 47 U.S.C. § 253; H.R.Rep. No. 104-458 (1996). *See alsoQwest Corp. v. Minnesota Public Utils. Comm.*, 427 F.3d 1061 (8th Cir.2005) (FTA was intended to create competition between carriers in local telecommunications service markets which had been traditionally dominated by a single monopoly carrier). Toward that end, the FTA prohibits state and local governments from creating "barriers to entry," legal requirements that prohibit or have the effect of prohibiting a company from providing telecommunication service. 47 U.S.C. § 253.

Section 253 provides in relevant part:

> Removal of barriers to entry.
>
> (a) In general
>
> No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

Section 253(a) preempts regulations that not only prohibit outright the ability of any entity to provide telecommunications services, but also those that "may ... have the effect of prohibiting the provision of such services." 47 U.S.C. § 253(a). Thus, while § 253 begins with a broad prohibition against state and local regulation, it then enumerates certain

narrow exceptions to the broad prohibition, thus leaving a "safe harbor" for limited local regulations.

A. The Ordinance as a Whole

To determine whether preemption exists under § 253(a), it is necessary to analyze whether the City's regulatory scheme "in combination" has "the effect of prohibiting the provision of telecommunications services." *City of Auburn v. Qwest,* 260 F.3d 1160, 1176 (9th Cir.2001). For example, the Court may considers such factors as the nature of the application process, the requirements to obtain a franchise, the threat of penalties for failure to obtain a franchise, and the discretion the city reserves to grant, deny, or revoke a franchise. *Id.*"And, the ultimate cudgel is that each city reserves discretion to grant, deny, or revoke the franchises and the Cities may revoke the franchise if the terms in the ordinance are not followed ...". *Id.*

When evaluating an ordinance in the context of § 253, the first inquiry is whether the challenged ordinance "prohibit[s] or [has] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." *XO Missouri v. City of Maryland Heights,* 256 F.Supp.2d, 987, 991 (E.D.Mo.2003). "Even if local requirements do not expressly prohibit a telecommunications service, the requirements might be so burdensome that they effectively achieve the same result." *Id.*, quoting *Qwest Corporation v. City of Portland,* 200 F.Supp.2d 1250, 1255 (D.Or.2002).

The Ordinance here requires providers of telecommunications services to complete a one-page

application for licensure. The Ordinance further requires compliance with the Department of Streets' normal permitting process. It also requires a provider to submit an application to amend its license whenever it wishes to expand its facilities. It also requires a provider to install and maintain conduit for the use and benefit of the City if requested and to bear entrenching costs associated with construction of the conduit and associated facilities installed for the City's exclusive use. The ordinance also requires a provider to maintain a performance bond for the benefit of the City, to obtain and maintain a liability insurance, and to indemnify the City for claims arising out of or in any way connected with the Licensee's communications transmission system. The Ordinance also permits a provider to use only licensed City contractors in constructing, installing, or maintaining private network facilities. In addition, under the Ordinance the City may revoke a license and cancel the underlying license agreement if the licensee violates the terms of that agreement or chapter 23.64. The City may also establish minimum technical standards and specifications which licensees must adhere to in installing their network facilities.

In light of the above, the Court believes the ordinance includes several provisions that "in combination" "have the effect of prohibiting" the ability to provide telecommunications services under 47 U.S.C. § 253(a).

B. Specific Provisions

Although the Court concludes that the

Ordinance as a whole violates § 253(a), the Court must next determine whether provisions of the Ordinance are saved by the safe harbor provisions of §§ 253(b) and (c). This determination is required because applying these provisions to the Ordinance as a whole without considering individual provisions could result in an improper infringement of the City's legitimate interests in regulating the uses of the public rights-of-way. *TCG New York, Inc., v. City of White Plains,* 305 F.3d 67, 76 (2d Cir.2002). On the other hand, applying § 253(a) to individual provisions without considering the Ordinance as a whole would neglect the possibility that a town could effectively prohibit telecommunications services through a combination of individually non-objectionable provisions. *Id.*

Pursuant to § 253(c), municipalities may "require fair and reasonable compensation from telecommunications providers ... for use of public rights-of-way" and the fees must be applied "in a nondiscriminatory manner." Thus, the question is whether the gross revenue fee and the per lineal foot fee are fair and reasonable compensation.

Level 3 argues the fees imposed by the City cannot be saved by § 253(c) because the City has admitted that its fees are not based on its costs. Level 3 contends the City has no idea what its actual costs are, nor has it ever attempted to quantify them. Level 3 argues that even if the City could cite to evidence of its costs, the structure of the fees demonstrates that the fees cannot be cost-based. Level 3 notes that one of that elements of "costs" is the administrative costs the City incurs fielding requests for permits and regulating the permitted construction. At the same

time, it argues all of those logistical tasks are handled by the Department of Streets, to which Level 3 or its contractors already pays fees when obtaining excavation permits. Level 3 also argues the Communications Division collects fees equal to 100% of its operating costs directly from the Cable Television franchise in the City, while the per-foot fees that Level 3 pays are deposited into the City's general fund where they are used to pay for all of the various services provided by the City, including parks, schools, etc.

Level 3 further maintains that the Ordinance that establishes the fees purports to require that Level 3 leave the rights of way in "as good a condition as before the work." Level 3 complains it is also required to immediately repair any damage to streets and surrounding property at its own cost and "to the satisfaction of the City" and that whenever Level 3's network is in the way of a City project, it is Level 3's obligation to relocate the network at its own expense. Level 3 argues that since it must directly pay for any present or future damage it causes to the rights-of-way, the additional per-foot fees cannot be directed towards any physical cost incurred by the City.

Level 3 also claims the fees are illegal because when the State of Missouri decided to take over fiscal responsibility for maintaining certain streets in the City, the City did not consider lowering or waiving Level 3's access fees for those streets, rather the Communications Division campaigned to protect its ability to collect these fees, despite the expected reduction in actual costs. Level 3 maintains that the City never formally notified Level 3 that the streets it occupies had been taken over by the State and that

the City was hoping to charge Level 3 as much as $90,257.17 for occupying streets that the City would not have to maintain. Thus, Level 3 contends that fees charged for access to roads that are no longer even within the City's technical jurisdiction cannot be "fair and reasonable" under the safe harbor provision of § 253(c).

The City counters that compensation under § 253(c) is not limited to "costs." The City argues it can charge a reasonable rent that is not limited to costs, therefore any discussion of the City's costs is irrelevant. As to the State of Missouri's purported takeover of certain City streets, the City denies the State has taken over any City streets, nor have any streets been removed from the City's technical jurisdiction.

This Court agrees with Judge Jackson's reasoning in *XO Missouri v. City of Maryland Heights,* 256 F.Supp.2d 987, 999 (E.D.Mo.2003), as well as other cases she cites, that revenue-based fees are impermissible under the FTA. Therefore, in order to meet the definition of "fair and reasonable compensation" the fee charged by the City must be directly related to the actual costs incurred by the City when a telecommunications provider makes use of the rights-of-way. As Judge Jackson noted, the legislative history of the FTA, as outlined in *Bell Atlantic-Maryland,* 49 F.Supp.2d at 817 n. 26, as well as the de-regulation concept in the FTA as a whole, supports this conclusion. As Judge Jackson further noted, "plainly a fee that does more than make a municipality whole is not compensatory in the literal sense, and instead risks becoming an economic barrier to entry." *XO Missouri,* 256 F.Supp.2d at

994, citing *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (stating that the FTA's primary purpose was to reduce regulation and encourage the rapid deployment of new telecommunications technologies).

Judge Jackson further explained:

> The legislative history of the FTA reveals that Congress expressly rejected a parity provision that would have required a single fee to be imposed on all carriers in a given area, because a parity requirement would ignore the different amounts of city rights-of-way each carrier used to provide its services. SeeBell Atlantic-Maryland, 49 F.Supp.2d at 817 n. 26. Furthermore, in the only Congressional floor argument to address the cost provisions of the FTA, Senator Diane Feinstein explained that telecommunications companies should only be required to pay their share of fees to enable local governments to recover the increased street repair and paving costs that result from repeated excavations of the rights-of-way. SeeIn re Classic Telephone, Inc., 11 F.C.C.R. 13,082 (F.C.C.1996) citing 141 Cong.Rec. S8172 (daily ed. June 12, 1995), quoted in TCG New York, Inc. v. City of White Plains, 125 F.Supp.2d 81, 90 (S.D.N.Y.2000). Thus, there is support for the holding that any type of revenue-based fee is invalid under the FTA and any "fair and reasonable compensation"

> charged by a municipality must be directly related to the actual costs incurred by a municipality when a telecommunications provider makes use of the rights-of-way.

XO Missouri, 256 F.Supp.2d at 994.

Under § 253(c) of the FTA, the City must bears the burden of proving that the fees it seeks are both fair and reasonable. The Court finds that the City in this case has not made such a showing as the City has not offered evidentiary support that the fees at issue here have any relation to the City's costs in managing, inspecting, and maintaining its rights-of-way. Thus, for the reasons discussed above, the Court finds that the plaintiffs have established that the City's fees are not related to any cost-study or actual costs of the City of St. Louis in maintaining its rights-of-way. Thus, the City's fees are invalid under the FTA.

Level 3 also argues certain provisions of the ordinance are not legitimately related to the City's management of its public rights-of-way and are therefore invalid under § 253(c). Section 253(c) allows a municipality to enact regulations that "manage the public rights-of-way." *XO Missouri* discussed the interpretation of "management of the public rights-of-way":

> The FTA does not define "management of the public rights-of-way," but ... a number of federal courts have relied on the FCC for interpretive assistance. The FCC has

explained that right-of-way management means control over the right-of-way itself, not control over companies with facilities in the right-of-way:

> [S]ection 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of the streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable, (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way ... [T]he types of activities that fall within the sphere of appropriate rights-of-way management ... include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.

256 F.Supp.2d 987, 995 (internal quotations omitted).

Senator Diane Feinstein, during the floor debate on § 253(c), offered examples of the types of restrictions that the Congress intended to permit under § 253(c), including requirements that:

1) regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;

2) require a company to place its facilities underground rather than overhead, consistent with the requirements imposed on other utility companies;

3) require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;

4) enforce local zoning regulations;

5) require a company to indemnify the City against any claims of injury arising from the company's excavation.

See In re Classic Telephone, Inc., 11 F.C.C.R. 13,082 (F.C.C.1996), citing 141 Cong. Rec. S8172 (daily ed. June 12, 1995), quoted in *City of Auburn*, 260 F.3d at 1177, 1178. This Court will now apply the aforementioned guidelines to the specific provisions of the Ordinance at issue.

License Agreement

Level 3 challenges Chapter 23.64.040, arguing the City attempts to limit the types of services it can provide. Chapter 23.64.040 provides that "no person

shall construct, operate, use, replace, reconstruct or maintain a communications transmission system which occupies the streets, public ways and/or public places within the City unless such person has first entered into a license agreement with the Board of Public Service ..." As the record shows, a license is required under chapter 23.64 for all telecommunications systems other than those that are used to provide basic local exchange service and long-distance services and that are subject to chapter 23.34. Neither the License Agreement nor chapter 23.64 prohibit Level 3 from providing basic local exchange service and long-distance services, or any other services. Level 3 can choose to offer these services at any time, in which case it will be subject to chapter 23.34. Accordingly, this Court concludes the license agreement requirement does not violate the Act.

License Application Process

Level 3 also challenges § 23.64.050(B). It provides: "[i]f the information in an application is incomplete or if the proposed use is inconsistent with the requirements of this chapter, the application may be returned as unacceptable for filing." Level 3 complains that the ordinance does not spell out what constitutes "inconsistent with the requirements," leaving the City with unacceptable discretion to bar telecommunications services and providers using the rights of way. This Court disagrees. The section provides that a license application can be returned if it is incomplete or if the proposed use is inconsistent with the requirements of chapter 23.64, for example, the application proposes to offer cable services. The

language of the provision does not give the City unfettered discretion to limit the types of services an applicant can provide. The provision is also unlike the Maryland Heights application process which required information about the types of services to be provided, the applicants legal, technical and financial qualifications, its performance record, as well as detailed mapping information to be provided in a form directed by the city engineer. *Cf.XO Missouri*, 256 F.Supp.2d 987, 990, 992, 996-97. Accordingly, the Court concludes this provision is valid under the FTA.

License Revocation Provisions

Level 3 also challenges chapter 23.64.080. Under chapter 23.64.080 "the City may revoke a license and cancel the underlying license agreement if the licensee violates the terms of that agreement or this chapter." *See*, 23.64.080(C). As the ordinance further provides, the City must give notice of a default and a 30-day opportunity to cure, as well as the right to a hearing before the Board of Public Service in which the City has the burden of proof. Moreover, chapter 23.64.080(C) authorizes the City to seize a licensee's facilities if a licensee chooses to abandon them. 23.64.100(C).

Level 3 complains that neither the license agreement nor the ordinance attempts to distinguish between material and non-material breaches so that "it seems that the City reserves to itself the power to terminate Level 3's License Agreement for any conduct it perceives as a breach." Level 3 maintains that "having terminated or revoked the License

Agreement, the City claims the right to ultimately seize Level 3's network for itself." Level 3 argues this provision is comparable to that struck down in *XO Missouri*.

The Court disagrees. In *XO Missouri*, Judge Jackson struck down a provision that permitted removal of all of a provider's facilities for any "material violation" of the Ordinance. She found that such an overbroad and unfettered penalty was not reasonably related to the City's management of its rights-of-way, particularly when there was no guidance as to what "material violation" could result in the removal of a provider's facilities. *XO Missouri*, 256 F.Supp.2d at 997.

Unlike the Maryland Heights provision, the Court finds that the ordinance does not give the City overbroad and unfettered discretion to terminate the license in light of its due process protections. The notice and opportunity to cure provisions ensure a licensee due process. The process protects both the City and licensee by ensuring a fair and orderly process. The revocation provision also provides a management tool that enables the City to enforce the terms of a license. Therefore the Court concludes it is valid under § 253(c) of the FTA.

Installation of Conduit

Level 3 next challenges Chapter 23.64.080(G). It provides in relevant part:

> The license agreement shall specify that the Licensee shall provide and install in a common trench with the conduit of the

> Licensee a municipal service conduit(s) if requested and specified by the Board of Public Service.
>
> . . . . .
>
> The Agency shall reduce subsequent license charges due under the license by an amount equal to the additional charge of the Licensee of the conduit, pull boxes, vaults, other materials and additional construction work, other than the cost of the trenching itself, incurred as a result of construction of the municipal service conduit. see, 23.64.80(G);

Level 3 argues the license agreement and ordinance allow the City to demand that Level 3 install and maintain conduit for the use and benefit of the City whenever Level 3 is doing construction related to its own network. It further argues that this type of in-kind construction is almost always more costly to it because the additional conduit usually requires different construction methods or procedures, adding to Level 3's costs. Level 3 further argues that to the extent the City invoked this provision with some telecommunications providers but not with others, its conduct would be discriminatory and not competitively neutral. It finally argues R.S. Mo. § 67.1842, which provides that "[i]n managing the public right-of-way and in imposing fees pursuant to sections 67.1830 to 67.1846, no political subdivision shall Create or erect any unreasonable requirement for entry to the public

right-of-way by public utility right-of-way users," prohibits cities from requiring any in-kind fees.

The Court does not construe the provision to require in-kind services to the City as Level 3 suggests. Instead, the City may only require Level 3 to install City conduit when Level 3 is already constructing in the public rights-of-way. Further, the ordinance provides that in the event the City would exercise this option, it would reimburse Level 3 for the full costs of the municipal conduit, in the form of a fee credit, including materials, labor, and additional construction expenses. The only cost that is not compensable is the cost of construction of the trench, which Level 3 would have to pay for in any event to install its own conduit. The Court therefore finds this provision to be valid under the FTA.

Level 3 further contends the fees are discriminatory and not competitively neutral. Level 3 complains that it pays per-foot fees to the City under the Ordinance, but at least three of its competitors, including Southwestern Bell Telephone ("SWBT"), McLeod USA, and XO (Nextlink), occupy the rights-of-way in St. Louis without paying fees under the ordinance. These three companies are permitted access to the rights of way without executing a license agreement similar to Level 3's, and instead operate under a different chapter which allows each company to pay a 10% gross-receipts tax rather than a per-foot-fee. Level 3 states that the fact that SWBT enjoys state-mandated freedom from the obligation to pay fees for access to the rights-of-ways of the City (or any other municipality) while Level 3 is required to pay fees for the same privilege, is neither competitively neutral nor nondiscriminatory.

Level 3's argument is unfounded. Every entity that operates in the City's public rights of way require some form of franchise or license. Chapter 23.64, through its licensing provisions, does not prohibit Level 3 from providing service; it enables Level 3 to provide service using public property.

As to differences between chapters 23.34 and 23.64, the City applies chapter 23.34 to any company that provides services functionally equivalent to the services provided by SWBT, i.e., basic local exchange and long distance services. Companies without state franchises, McLeod USA and XO, for example, obtain local authorization to use the public rights of way by agreeing to be bound by chapter 23.34 which imposes a 10% gross receipts tax.

This Court concludes that the distinctions between chapters 23.34 and 23.64 are justifiable and that the City's treatment of those who claim state franchises and those that require local authorization is rational. Moreover, Level 3 has not presented any evidence to suggest that the differences between the two chapters prohibit or may have the effect of prohibiting Level 3 from providing any service.

Bond and Insurance Requirements

Level 3 next complains the Ordinance imposes duplicative and inconsistent bond and insurance requirements on telecommunications companies. Level 3 maintains the ordinance requires it to obtain bonds and insurance, in addition to what the company or its contractors already must obtain pursuant to the street permitting process, citing § §§ 23.64.120, St. Louis Rev.Code § 20.030, License

Agreement at § 8(B). Level 3 argues the duplicative bond requirement only affects telecommunications companies such as Level 3 because non-telecommunications rights of way users are not subject to the ordinance or license agreements. It argues that insofar as the duplicative bond requirements create conditions that attach only to telecommunications providers, and the effect of noncompliance can be exclusion or expulsion from the market, those duplicative requirements are not permissible under the FTA. Level 3 next claims other providers licensed by the Communications Division have lower bond and insurance requirements in their license agreements and therefore, the lower requirements are not competitively neutral.

The City counters that Level 3's annual premium for its bond is only $600. As to Level 3's insurance requirements, the City notes that Level 3 has admitted it has one policy for numerous jurisdictions and that Level 3 pays no incremental cost for its umbrella insurance policy.

The Court concludes the bond and insurance requirements are standard tools for management of the City's public rights-of-way, and are therefore valid under the FTA.

Indemnification Requirements

Level 3 next complains about the "open-ended" nature of the License Agreement provision requiring Level 3 to indemnify the City against all damages connected with Level 3's network. § 8(C). Level 3 argues that many of its competitors were not required to provide the same broad indemnification

in their own license agreements. The City counters that the indemnification language in all post-1996 license agreements is the same as that in the Level 3 License Agreement. The Court notes Senator Feinstein cited indemnification provisions as one of the examples of the types of restrictions that Congress intended to permit under § 253(c). The Court concludes this provision is related to the City's management of its public rights-of-way and is therefore protected by § 253(c), the safe harbor provision.

Obtaining City Consent Prior to Transfer

Level 3 next challenges Chapter 23.64.170(A). It states that a license shall not be transferred without the prior written authorization of the Board of Public Service. Level 3 maintains the Ordinance and License Agreement purport to give the City the power to approve or deny a transfer of ownership of Level 3's network facilities. The City argues that the purpose of the requirement is simply to know who is in control and to ensure that the entity operating a system in the public rights-of-way accepts responsibility.

This Court agrees with the City that purpose of the requirement is to know who is in control and to ensure that the entity operating a system in the public rights-of-way accepts responsibility. The provision directly relates to the management of the public rights-of-way. The cases cited by Level 3 are distinguishable. For example, in *City of Auburn v. Qwest*, 260 F.3d 1160, 1178 (9th Cir.2001), the Ninth Circuit held ordinances to be invalid which regulated

ownership of telecommunications companies regardless of whether ownership affected the rights of way. The court found the municipal regulation of stock transfers extended far beyond management of the rights of way and was more than necessary to manage the rights of way. Likewise, in *TCG New York, Inc. v. City of White Plains,* 305 F.3d 67, 82 (2d Cir.2002) the Second Circuit held invalid a provision of "sweeping breadth" whose main purpose was to force each new telecommunications provider to receive the city's blessing before offering services, even if its services represent no change from the services offered and burdens imposed by a prior franchisee. Here the City's provision does not have the same "sweeping breadth" as in *TCG New York,* and is therefore valid.

Reporting Requirements

Level 3 also challenges the Ordinance's reporting requirements. Chapter 23.64.050(A)(4) requires upon application for a license the inclusion of an "engineering site plan showing the proposed location of the communications transmission system, including any manholes or overhead poles, the size, type and proposed depth of any conduit or other enclosures, and the relationship of the system to all existing streets, sidewalks, poles, utilities, and other improvements within the public streets." Chapter 23.150(I) further requires a licensee keep accurate, complete and current maps and records of its system and facilities which occupy the streets, public ways and public places within the City and shall furnish as soon as they are available three (3) complete copies of such maps and records to the agency.

The Court first notes that Level 3 misreads the plain language of the ordinance; it does not require a licensee to keep data other than in its own business format. The Court holds these requirements are directly related to the City's management of its public rights-of-way and therefore valid under the FTA. *Cf.XO Missouri,* 256 F.Supp.2d at 983 (declaring ordinance invalid which required provider to furnish maps to the City in the form directed by the City Engineer, rather than in the form maintained by the user).

City Licensed Contractor

Level 3 challenges chapter 23.64.140(D). It requires a licensee to use only contractors who have been licensed by the City in constructing, installing, or maintaining private network facilities installed under the license. The Court concludes this provision is reasonable public safety requirement which protects the City and other users of the public rights-of-way from dangers arising from construction or installation work undertaken by unqualified contractors. It is therefore valid under § 253(c) of the Act.

Minimum Technical Specifications 23.64.140

Level 3 also challenges the minimum technical specifications set forth in chapter 23.64.140(A). The city permits variations to the technical requirements as the ordinance allows. *See* 23.64.140(B). This provision enables communities to coordinate the placement of facilities in the public rights-of-way and

protect against any unique conditions that might be present in a particular community. It is therefore protected by the safe harbor provision, § 253(c).

State law claims

In counts VI and VII of its amended complaint Level 3 also argues that the fees imposed by the ordinance violate SB 369, codified at R.S. Mo. §§ 67.1830-67.1846. The statute expressly limits the amounts the City may collect from telecommunications companies who are using the public rights-of-ways to "actual, substantiated costs." R.S. Mo. § 67.1840.2(1). Level 3 argues that since the City's fees are not linked to any of its costs, and there are no circumstances under which the City can meet its burden to substantiate that fact, the fees must be declared illegal under state law.

The City argues it is exempt from SB 369 by the statute's grandfathering clause. Missouri Revised Statute § 67.1846.1 states that a public utility right of way user is not relieved of its obligations under an "existing franchise, franchise fees, license or other agreements or permit in effect on May 1, 2001." Moreover, § 67.1846.1 permits "grandfathered political subdivisions" to enforce existing linear foot ordinances. The City argues it is a grandfathered political subdivision because it enacted Ch. 23.64- which imposes the linear foot fee-prior to May 21, 2001. Level 3 contends the grandfathering clause does not apply, arguing that it was compelled to enter into the License Agreement by virtue of Chapter 23.64, which itself violates the state statute.

The Court agrees that under Level 3's

reasoning, the grandfathering clause would be rendered virtually meaningless. The Court therefore concludes the City is exempt from SB 369 by virtue of § 67.1846.1. Therefore the Court concludes City's fees are not invalid under state law.

42 U.S.C. § 1983 claim

In count VII of its amended complaint, Level 3 also asserts a claim pursuant to 42 U.S.C. § 1983. Level 3 argues it is entitled to a refutable presumption of damages under § 1983 because (1) it is an intended beneficiary under the Act whose protected rights are not so vague and ambiguous that their enforcement would strain judicial competence; and (2) the Act unambiguously imposed a binding obligation on the states, and by extension the City.

"Section 1983 does not provide an avenue for relief every time a state actor violates a federal law." *City of Rancho Palos Verdes, Calif. v. Abrams*, 544 U.S. 113, 125 S.Ct. 1453, 1458, 161 L.Ed.2d 316 (2005); *Forest Park II, a Minn. Ltd.Partnership v. Hadley*, 408 F.3d 1052 (8th Cir.2005).

Violation of a federal statute does not automatically give rise to a civil rights claim under § 1983. This is because "[i]n order to seek redress through § 1983, ... a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997) (emphasis in original); *seealsoGonzaga Univ. v. Doe*, 536 U.S. 273, 283, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002) ("[I]t is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under

the authority of [§ 1983].") (emphasis in original). Section 1983 provides a method of redress only for those federal statutes which "create enforceable rights, privileges, or immunities within the meaning of § 1983." *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987). "Accordingly, to sustain a § 1983 action, the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs." *Id.* The plaintiff bears the burden to demonstrate that the statute at issue confers a federal right on the plaintiff. *Arkansas Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 523 (8th Cir.1993). The Supreme Court recently clarified that nothing short of an "unambiguously conferred right" will support a cause of action brought under § 1983. *Gonzaga Univ.*, 536 U.S. at 283, 122 S.Ct. 2268.

The touchstone for determining whether a statute confers a private right of action is congressional intent. *Thompson v. Thompson*, 484 U.S. 174, 179, 108 S.Ct. 513, 98 L.Ed.2d 512 (1988). " '[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.' " *Id.* (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981)); *see alsoGonzaga Univ.*, 536 U.S. at 286, 122 S.Ct. 2268 ("[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action.").

Although the Eighth Circuit has not addressed this issue, the Tenth Circuit did so in *Qwest v. City of Santa Fe* 380 F.3d 1258, 1265-67 (10th Cir.2004), affirming the district court that no action under § 1983 was available because nothing in the text or structure of § 253 indicated an intention to create a private right. *Cf.City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 125 S.Ct. 1453, 1454, 161 L.Ed.2d 316 (2005) (holding enforcement of the TCA's substantive provisions "through § 1983 would distort the scheme of expedited judicial review and limited remedies created by" the TCA's remedial provisions; after identifying the express private remedy in the TCA, § 332(c)(7), the Court concluded that Congress did not intend this remedy to coexist with an alternative remedy available in a § 1983 action). This Court concludes Level 3 has not met its burden to demonstrate that the Act confers a federal right on it, *seeArkansas Med. Soc'y,* 6 F.3d at 523, and therefore holds that no cause of action under § 1983 is available. Accordingly, the Court will deny Level 3's motions for summary judgment on its § 1983 claim.

Severability

The Court now addresses whether the entire ordinance must be declared invalid. Severability is a matter of state law. *Leavitt v. Jane L.,* 518 U.S. 137, 139, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996). Missouri courts have traditionally used section 1.140 R.S.MO. as the test for severability of an unconstitutional county ordinance provision. *SeeAvanti Petroleum, Inc. v. St. Louis County,* 974 S.W.2d 506, 512 (Mo.Ct.App.1998). The test, as enumerated in *Avanti Petroleum,* is:

> The ordinance is valid, regardless of invalid provisions, unless the Court finds the valid provisions of the [ordinance] are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed [the City] would have enacted the valid provisions without the void one; or unless the Court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Id. Applying the above standard to the instant case, the Court determines that severability is appropriate. The Ordinance contains several express purposes, including obtaining compensation for use of public rights-of-way, providing the City with underground conduit for municipal use, and properly managing what occurs within those public rights of-way. While this Order invalidates the fee provisions of chapter 23.64, other legislative purposes expressed by the City, including management of the public rights-of-way, can still be accomplished. Accordingly, the remaining provisions of chapter 23.64 will be upheld.

Finally, Level 3 moves to strike the city's reply to plaintiff's response to the City's Statement of facts. Under Federal Rule of Civil Procedure 12(f), a court may "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike are not favored and are infrequently granted, because they propose a drastic remedy. *Stanbury*

Law Firm v. Internal Revenue Service, 221 F.3d 1059, 1063 (8th Cir.2000). Matter will not be stricken unless it clearly can have no possible bearing on the subject matter of the litigation. 2 James W. Moore, et al., *Moore's Federal Practice* § 12.37[3] (3rd ed.2003). If there is any doubt whether the matter may raise an issue, the motion should be denied. *Id.* If allegations are redundant or immaterial, they should be stricken only if prejudicial to the moving party. *Id.*

Nonetheless, resolution of such a motion lies within the broad discretion of the Court. *Stanbury,* 221 F.3d at 1063. The Court in its discretion will deny the motion.

III. CONCLUSION

For all of the above reasons, the Court will grant in part and deny in part Level 3's motion for summary judgment. The Court will grant in part and deny in part the City's motion for summary judgment.

Accordingly,

IT IS HEREBY ORDERED that the City of St. Louis's motion for summary judgment is **GRANTED** in part and **DENIED** in part. (Doc. 53)

IT IS FURTHER ORDERED that Level 3's motion for summary judgment is **GRANTED** in part and **DENIED** in part. (Doc. 55.)

IT IS FURTHER ORDERED that the City of St. Louis's motion to amend/correct is **GRANTED**. (Doc. 66).

IT IS FURTHER ORDERED that Level 3's motion to strike the City's reply to responses to its statement of facts is **DENIED**. (Doc. 70).

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 06-1398

Level 3 Communications, L.L.C., Appellee

v.

City of St. Louis, MISSOURI, Appellant

City of St. Louis, MISSOURI, Appellant

v.

Level 3 Communications, L.L.C., Appellee

Missouri Chapter of the National Association of Telecommunications Officers and Advisors, et al.,

Amici on behalf of Appellant

Southwestern Bell Telephone L.P., doing business as AT&T, et al.,

Amici on Behalf of Appellee

No: 06-1459

Level 3 Communications, L.L.C., Appellant

v.

City of St. Louis, MISSOURI, Appellee

City of St. Louis, MISSOURI, Appellee

v.

Level 3 Communications, L.L.C., Appellant

Missouri Chapter of the National Association of Telecommunications Officers and Advisors, et al.,

Amici on Behalf of Appellee

Verizon Telephone Companies, et al.,

Amici on behalf of Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis

(4:04-cv-00871-CAS)

(4:04-cv-01046-CAS)

CORRECTED ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Riley would grant the petition. Chief Judge Loken took no part in the consideration or decision of

this matter. Judge Beam took no part in the consideration or decision of the petition for rehearing by the panel.

April 17, 2007

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX F

Chapter 23.64:
COMMUNICATIONS TRANSMISSION SYSTEMS

Sections:

23.64.010 Citation.
23.64.020 Definitions.
23.64.030 Purpose.
23.64.040 License requirement.
23.64.050 Application for license.
23.64.060 Service of notice.
23.64.070 No liability or warranty.
23.64.080 License conditions.
23.64.090 License charge.
23.64.100 License fees--Payment--Audit.
23.64.110 Agency powers and duties.
23.64.120 Bonds.
23.64.130 Indemnity--Insurance.
23.64.140 Minimum technical specifications.
23.64.150 Streets and pole attachment use.
23.64.160 Police power.
23.64.170 Transfers, assignments and subleases.
23.64.180 Retroactivity of provisions.

23.64.010 Citation.

This chapter shall be known as and may be cited as the "St. Louis City Communications Transmission Systems ordinance" and shall be codified. (Ord. 62233 § 1, 1991.)

23.64.020 Definitions.

As used herein the following terms have the following meanings unless the context clearly indicates otherwise:

A. "Agency" means the Communications Division, under the Office of the President, Board of Public Service, or its successor agency.

B. "Applicant" means the person who applies pursuant to Section 23.64.040, for a license for the erection, construction, reconstruction, operation, maintenance or use of a communications transmission system by such person in the City of St. Louis.

C. "Cable system" means a cable television system as presently defined in 47 U.S.C. Section 522 (6) or as may be defined by subsequent federal legislation.

D. "City" means the City of St. Louis, Missouri, a municipal corporation.

E. "Communications transmission system" means a facility consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed and used for the transmission of video, voice or data signals, which facility occupies public streets, alleys or rights of ways or other public places within the City, except for the following: cable television systems franchised by the City; telephone systems subject to regulations by the Public Service Commission of the State of Missouri and franchised by the City; telegraph systems franchised by the City; or other communications facilities are franchised by the City.

F. "FCC" means the Federal Communications Commission or any successor agency thereto.

G. "License" means the privilege granted by the City which authorizes a person to erect, construct,

operate, use and maintain a communications transmission system that occupies the streets, public ways or public places within the City. Any license issued in accordance herewith shall be a nonexclusive license.

H. "Licensee" means a person who is issued a license or licenses in accordance with the provisions of this chapter for the erection, construction, reconstruction, operation, maintenance, and use of a communications transmission system in the City.

I. "License agreement" means a contract entered into in accordance with the provisions of this chapter between the City and a licensee that sets forth the terms and conditions under which the license will be exercised.

J. "Person" means any individual, corporation, partnership, association, joint venture or organization of any kind and the lawful trustee, successor, assignee, transferee or personal representative thereof.

K. "Permit" means the permission granted by the Board of Public Service or other City agency or department for excavation of streets, public right-of ways, use of poles, bridges, etc. upon posting of construction bonds or insurance policies, which would be required under City Code or Ordinance for any construction within the City.

L. "Public street" is the surface and space above and below any public street, avenue, highway, boulevard, concourse, driveway, bridge, tunnel, park, parkway, waterway, dock, bulkhead, wharf, pier, alley, right-of-way, public utility easement, and any

other public ground or water within or belonging to the City.

M. "Transfer of a license" means any sale, lease, sublease, rental, hypothecation, conveyance, assignment or similar transaction whereby a financial or ownership interest in a license issued pursuant to the provisions of this chapter, or in a communications system for which a license has been issued pursuant to the provisions of this chapter, is transferred by the licensee to another person. The transfer or sale of stock in a corporation which possesses a license issued under the provisions of this chapter, which stock is listed on a stock exchange or which is available for purchase by the public through recognized stock brokers, shall not constitute a transfer of a license pursuant to this section. The transfer or sale of stock in a privately held corporation shall not constitute a transfer of a license pursuant to this section unless more than fifty percent (50%) of the total capital stock of such corporation is sold or transferred within a one year period. (Ord. 62233 § 2, 1991.)

23.64.030 Purpose.

A. The purpose of this chapter is:

1. To regulate the erection, construction, reconstruction, installation, operation, maintenance, and use of a communications transmission system, in, upon, along, across, above, over, under or in any manner connected with the public streets, alleys, right-of-ways or other public places within the corporate limits of the City, as now or in the future may exist; and

2. To provide the City with compensation for occupation and use of the City's right-of-ways by a communications transmission system; and

3. To provide the City compensation for the cost of regulation imposed by this chapter on communications transmission systems;

4. To provide the City with underground conduit for municipal use.

B. The Board of Aldermen finds and declares that the most effective method to achieve the purposes of this chapter, consistent with applicable law and the Charter, with minimal administrative processes, is by a standard license agreement executed by the Board of Public Service, and administered by the Agency, on behalf of the City. (Ord. 62233 § 3, 1991.)

23.64.040 License requirement.

No person shall construct, operate, use, replace, reconstruct or maintain a communications transmission system which occupies the streets, public ways and/or public places within the City unless such person has first entered into a license agreement with the Board of Public Service, as provided herein. Nor shall any person continue to operate a communications transmission system, which occupies the streets, public ways, and/or public places within the City, and which is in operation on the effective date of this ordinance, unless such person has made an application to the Board of Public Service for a license, in a form substantially complying with this chapter, as provided herein, within ninety (90) days of the effective date of this ordinance. Nor shall any person to whom a license

has been issued hereunder make substantial modifications to an existing communications transmission system, including, but not limited to, adding new conduit or transmission lines to an existing system, without first entering into a new or amended license agreement with the Board of Public Service. (Ord. 62233 § 4, 1991.)

Editor's Note:

Ord. 62233 was approved March 8, 1991.

23.64.050 Application for license.

A. The application for a license shall be on a form supplied by the Agency and include as a minimum the following information:

1. The name, address and telephone number of the applicant;

2. The legal status of the applicant;

3. The name, address and telephone number of a responsible person whom the City may notify or contact at any time concerning the communications transmission system;

4. An engineering site plan showing the proposed location of the communications transmission system, including any manholes or overhead poles, the size, type and proposed depth of any conduit or other enclosures, and the relationship of the system to all existing streets, sidewalks, poles, utilities, and other improvements within the public streets;

5. Minimum technical standards which the licensee proposes to follow in construction of the licensed system;

6. Diameter and projected length of the communication aerial or conduit;

7. Any additional information which the Agency may require, subject to the approval of the Board of Public Service.

B. If the information in an application is incomplete or if the proposed use is inconsistent with the requirements of this chapter, the application may be returned as unacceptable for filing.

C. If the information provided in an application is complete, and it appears that the applicant has satisfied the requirements of this chapter, the Agency shall supply a draft of the proposed license agreement to the Board and shall recommend to the Board of Public Service that the Board should approve execution of a license agreement with the applicant. If the Board of Public Service finds that the requirements of this chapter and the regulations promulgated hereunder have been complied with by the applicant, the Board of Public Service shall then approve execution of a license agreement with the applicant by the Agency. If the Board of Public Service finds that execution of the draft of the proposed license agreement provided to it by the Agency would not comply with the chapter and regulations promulgated thereunder, it shall have the authority to direct the Agency to amend the license agreement, so as to comply with the chapter and applicable regulations, prior to execution thereof. Upon approval of the license agreement by the Board of Public Service, the Agency is empowered to execute a license agreement, in substantially the form approved by the Board, with the applicant on behalf of the City. The license agreement will become effective upon its execution by the City and the applicant, payment by the applicant of the initial

license fee, and satisfaction of the bond and insurance requirements contained in the license agreement.

D. In the event that during the course of the term of a license agreement the licensee desires to expand the communications transmission system facilities, operated by it within the corporate limits of the City, to include additional facilities or additional locations, application shall be made for an amendment of the license agreement. The procedure followed for such an amendment shall be the same as that for the initial license. (Ord. 62233 § 5, 1991.)

23.64.060 Service of notice.

All notices required to be given to the City under any provision of this chapter shall be deemed served when delivered by hand, or sent by certified United States mail, return receipt requested, in writing to the Cable Communications Manager of the Agency, or to any person in charge of the Agency during normal business hours. (Ord. 62233 § 6, 1991.)

23.64.070 No liability or warranty.

This chapter shall not be construed to create or hold the City responsible or liable for any damage to persons or property by reason of any inspection or reinspection authorized herein or failure to inspect or reinspect, nor shall the issuance of any license nor the approval or disapproval of any installation authorized herein constitute any representation, guarantee or warranty of any kind by, nor create any liability upon, the City or any official, agent or employee thereof. (Ord. 62233 § 7, 1991.)

23.64.080 License conditions.

A. A license granted by the City pursuant to this chapter shall not become effective until a license agreement between the City and the licensee has been executed by both parties. The term of such a license agreement shall not exceed fifteen (15) years. It shall be renewable by the licensee upon its application and grant by the City, subject to the execution of a new license agreement.

B. Any license agreement issued shall incorporate by reference the requirements of this chapter, and the licensee shall agree therein to comply with the requirements of this chapter.

C. Pursuant to the provisions of this subsection, the City may revoke a license and cancel the underlying license agreement if the licensee violates the terms of that agreement or this chapter:

1. Whenever he has cause to believe that a licensee is in violation of the terms of its license agreement or this chapter, the Cable Communications Manager shall issue a notice of violation to the licensee. Said notice shall be served upon the licensee either by hand-delivering said notice to the licensee or by sending the notice, via regular United States mail, postage prepaid, to the address provided in the license agreement for service of notices on the licensee.

2. The licensee shall have thirty (30) days from the date of said notice to rectify or cure the violation. If the violation has not been rectified or cured after thirty (30) days from the date of the notice, then the Cable Communications Manager shall revoke the license and cancel the license agreement. However, if the Cable Communications Manager determines that

the licensee is proceeding with due diligence to rectify or cure a violation he shall not be required to revoke the license and cancel the license agreement, even though thirty (30) days have passed since the date of the notice of violation, except that this sentence shall not apply where the violation for which the licensee is cited involves or is related to failure to pay license fees owed to the City under the license agreement or failure to pay taxes owed to the City.

3. A licensee may appeal a notice of violation to the Board of Public Service by filing a letter appealing from said notice with the Board within ten (10) days of the date on which said notice was issued. Said letter shall not be required to be in any particular form, but shall specify the grounds on which the licensee disputes the notice of violation. Filing of a letter of appeal within the above time limit shall stay all proceedings upon the notice of violation until the Board of Public Service has ruled on the appeal. The Board of Public Service shall then schedule a hearing for purposes of determining whether the licensee is in violation of either the license agreement between it and the City or this chapter. The Board shall provide a minimum ten (10) days notice of the date and time of the hearing to both the licensee and the Cable Communications Manager. At the hearing, the licensee may be represented by counsel and shall be given the opportunity to present evidence and witnesses and to cross-examine witnesses presented by the Cable Communications Manager. The burden of proof at such a hearing shall be upon the Cable Communications Manager.

4. Where the Cable Communications Manager has revoked a license and canceled the underlying license agreement based upon his determination that a license has failed to rectify or cure a violation within thirty (30) days of the date on which the violation notice was issued, the licensee may appeal the determination of the Cable Communications Manager that the licensee has failed to rectify or cure the cited violation to the Board of Public Service by filing a letter of appeal with the Board within ten (10) days of the date on which the Cable Communications Manager revoked the license of the licensee. Said letter shall not be required to be in a particular form, but shall specify the grounds on which the licensee disputes the determination of the Cable Communications Manager that the licensee has failed to rectify or cure the violation in question. Filing of a letter of appeal shall stay revocation of the license, unless the Board of Public Service determines, upon application of the Cable Communications Manager, that the alleged violation presents a threat to public safety or damage to public or private property. The Board of Public Service shall then schedule a hearing for purposes of determining whether the licensee has rectified or cured the violation(s) in question. The Board shall provide a minimum of ten (10) days notice of the date and time of the hearing to both the licensee and the Cable Communications Manager. At the hearing, the licensee may be represented by counsel and shall be given the opportunity to present evidence and witnesses and to cross-examine witnesses presented by the Cable Communications Manager. The burden of proof at such hearing shall be upon the Licensee. It shall not be a defense in a hearing called pursuant to

the provisions of this subparagraph that the violation(s) alleged in the notice sent to the licensee pursuant to the provisions of subdivision 1 of this subsection was not a violation of either this chapter or the license agreement between the City and the licensee.

D. Any license shall apply only to the facilities and locations identified in the license agreement.

E. Nothing in this chapter or in any license agreement shall be construed as a representation, promise or guarantee by the City that any permit or other authorization required under any City ordinance or regulation for the construction or installation of a communications transmission system shall be issued.

F. A licensee may terminate the license agreement only if it ceases to use the conduit and transmission lines licensed thereunder and either transfers such conduit and transmission lines to another licensee, in the manner contemplated by Section 23.64.170, or conveys such conduit and transmission lines to the City, without charge therefor.

G. The license agreement shall specify that the Licensee shall provide and install in a common trench with the conduit of the Licensee a municipal service conduit(s) if requested and specified by the Board of Public Service. Such request by the Board must be made either at the time it approves the license agreement or a minimum of thirty (30) days prior to Licensee commencing construction, if such request is not made at the time the license agreement is approved. The Agency shall reduce subsequent

license charges due under the license agreement by an amount equal to the additional charge to the Licensee of the conduit, pull boxes, vaults, other materials and additional construction work, other than the cost of the trenching itself, incurred as a result of construction of the municipal service conduit. Prior to commencement of construction of municipal service conduit(s), a licensee shall provide the office of the President of the Board of Public Service with a copy of all contracts related to construction thereof. If the Board of Public Service finds that construction of a municipal service conduit would be too costly, it may cancel its request for construction of a municipal service conduit. In such case, the licensee shall immediately cancel all contracts for such conduit, and the licensee shall only be credited against subsequent license charges for such expenses as it has incurred related to construction of the municipal service conduit, or become obligated to expand thereon, prior to cancellation of the request for construction of such conduit. Upon completion of construction of a municipal service conduit, a licensee shall certify to the Agency the total costs incurred by it in constructing the municipal service conduit. In no event shall a Licensee be entitled to credit against subsequent license charges, pursuant to the provisions of this subsection, in an amount in excess of one-hundred-ten percent (110%) of the costs, as specified in the contracts provided to the office of the President of the Board of Public Service prior to commencement of construction of the municipal service conduit, attributable to construction of the municipal service conduit. The Agency or Comptroller shall be entitled to audit the books of the licensee to

determine whether expenses alleged to have arisen as a result of the construction of the municipal service conduit were actually expended thereon.

H. All license agreements entered into pursuant to the provisions of this chapter shall contain the following language:

Licensee shall never make any claim of any kind or character whatsoever against the City of St. Louis for damages that it may suffer by reason of the installation, construction, reconstruction, operation and/or maintenance of any public or private improvement, utility, or communication facility, whether presently in place or which may in the future be constructed or installed, including, but not limited to, any water and/or sanitary sewer mains and/or storm sewer facilities and whether such damage is due to flooding, infiltration, backflow and/or seepage caused from the failure of any installation, natural causes or from any other cause of whatsoever kind or nature, except for damages occasioned by the intentional conduct or gross negligence on the part of the City, it being further expressly understood this limitation of liability does not apply to independent contractors of the City of St. Louis.

(Ord. 62233 § 8, 1991.)

23.64.090 License charge.

In consideration of the rights and privileges granted by this chapter, Licensees shall pay the City an annual sum calculated as follows:

A. For the year beginning July 1, 1991:

1. The amount of one dollar fifty cents ($1.50) per linear foot for underground transmission lines or conduit of four (4) inches in diameter or less;

2. The amount of two dollars ($2.00) per linear foot for underground transmission lines or conduit of over four (4) inches in diameter but less than eight (8) inches in diameter;

3. The amount of three dollars ($3.00) per linear foot for underground transmission lines or conduit of eight (8) inches or more in diameter;

4. The amount of one dollar fifty cents ($1.50) per linear foot for each one inch in diameter or fraction thereof of aerial wire; Licensees shall pay a minimum charge of fifty dollars ($50.00) per annum.

B. Commencing July 1, 1991 and annually thereafter, the license charge shall be calculated by multiplying the previous year's license fee by the percentage change from the previous year in the National Consumer Price Index (Index), published by the United States Department of Labor. In the event such Index ceases to be published, the City's Board of Estimate and Apportionment may select another measure of general price changes. By June 1, 1991, and each June 1 thereafter, the Agency shall notify each licensee of the revised license charges to be effective on the following July 1. Every license agreement shall reflect the schedule of charges specified herein and the annual adjustments thereto.

C. The above specified charges shall apply to all conduit and transmission lines, whether owned or leased by the licensee.

D. Whenever a license agreement is executed on a date other than July 1, the initial annual fee shall

be prorated for the remainder of the year ending June 30 and shall be payable upon approval of the license agreement by the City.

E. The charges specified herein shall be in addition to and exclusive of all general municipal taxes of whatever nature, including, but not limited to, ad valorem taxes, earnings taxes, and employment taxes. (Ord. 62233 § 9, 1991.)

23.64.100 License fees--Payment--Audit.

A. The annual compensation for a license as provided for in Section 23.64.090 shall be payable annually on July 1 of each calendar year.

1. Each annual payment shall be by check payable to the City filed with the City's Comptroller.

2. Each payment shall be accompanied by a report from the Licensee in a form approved by the City, showing the basis for the computation.

B. The acceptance of any Licensee payment by the City shall not be construed as an acknowledgement that the amount paid is the correct amount due, nor shall such acceptance of payment be construed as a release of any claim which the City may have for additional sums due and payable.

1. All fee payments and accompanying reports shall be subject to audit by the Comptroller and assessment or refund if the payment is found to be in error.

2. In the event that such audit results in an assessment by and an additional payment to the City, such additional payment shall be subject to interest at the rate of one and one-half percent (1 1/2%) per month and penalties in the amount of one

percent (1%) per month or any fraction of a month elapsed after the due date where the additional payment exceeds five percent (5%) of the amount paid by the Licensee.

C. Failure of a Licensee to pay the license charges within thirty (30) days of their due date shall subject the Licensee to a ten percent (10%) penalty and interest charges of one and one-half percent (1½%) per month, or portion thereof, for each month payment is delinquent. Failure of a licensee to make the annual payment within ninety (90) days of its due date may subject the licensee to the revocation of its license and cancellation of its license agreement following thirty (30) days notice from the City. In such event, the licensee shall be considered to have abandoned the conduit and transmission lines permitted under the license agreement, and said conduit and line shall become the property of the City.

D. Nothing in this ordinance shall be construed to limit the liability of the Licensee for all applicable Federal, State and local taxes. (Ord. 62233 § 10, 1991.)

23.64.110 Agency powers and duties.

The Agency shall have the following powers and duties.

A. Receive, review and recommend action on applications for licenses for any communications system and generally administer this chapter.

B. Receive and review all Board of Public Service permits for any communications transmission system.

C. Review and audit all reports and filings submitted by an Applicant or Licensee to the City pursuant to this chapter.

D. Submit recommended regulations regarding the construction, reconstruction, operation, maintenance, dismantling, testing of any communications transmission systems licensed in accordance herewith to the Board of Public Service for consideration and promulgation.

E. Inspect facilities and construction and enforce regulations during construction or operation of a communications transmission system, including but not limited to the power to halt construction found to be out of compliance with this chapter, building codes, permit requirements and regulations promulgated in accordance herewith. (Ord. 62233 § 11, 1991.)

23.64.120 Bonds.

A. The license agreement shall require the licensee to have in force at all times a performance bond in an amount specified in the license agreement as necessary to ensure the faithful performance by the licensee of its obligations under the license agreement. Such surety instruments must be provided by an entity qualified to do business in the State of Missouri and in a form approved by the City Counselor.

B. None of the provisions of this section nor any bond accepted by the City pursuant hereto, nor any damages recovered by the City thereunder, shall be construed to excuse the faithful performance by or limit the liability of the Licensee under this chapter or any license agreement issued in accordance

herewith or for damages either to the full amount of such bond or otherwise. (Ord. 62233 § 12, 1991.)

23.64.130 Indemnity--Insurance.

A. The City shall not at any time be liable for any injury or damage occurring to any person or property from any cause whatsoever, including damages from the City's negligent omissions, if any, arising from the installation, use, operation or condition of the Licensee's communications transmissions system.

B. The Licensee shall indemnify, save and hold harmless and defend the City from all claims, liens, charges, including but not limited to libel, slander, invasion of privacy and unauthorized use of any trademark, trade name or service mark; demands; suits; actions; fines; penalties; losses; costs, including but not limited to, reasonable legal fees and court costs; judgments; injuries; liabilities or damages, in law or equity, of any and every kind and nature whatsoever, including damages caused by or arising out of any act or negligent omission of the City, its officers, servants, agents, employees or contractors, or otherwise, arising out of or in any way connected with the installation, use, operation, maintenance or condition of the Licensee's communications transmission system.

C. The license agreement shall specify the amount, type and coverage of insurance required and shall require that the City be named as an additional insured on insurance policies procured by a Licensee to comply with the terms of the license agreement. The amount, type and coverage required shall be determined by the Board of Public Service on the Recommendation of the Agency. In setting the

amount, the Board and the Agency shall take into consideration the size and location of the communications system, the financial resources of the Licensee, risk involved to the City and to the general public as well as other salient factors. But in no case will coverage be less than fifty thousand dollars ($50,000.00) per person and five hundred thousand dollars ($500,000.00) per incident for personal injury liability and fifty thousand dollars ($50,000.00) for property damage liability. Insurance required pursuant to this section shall be in addition to any bond or insurance required by any other City agency or department for issuance of permits necessary for construction and installation of a communication transmission line.

D. The policy of insurance to be procured by a licensee pursuant to this provision shall provide that the insurance shall not be cancelled or materially altered without thirty (30) days written notice first being given to the agency. If the insurance is cancelled or materially altered the licensee shall provide a new policy with the same terms as required by the license agreement. The license agreement shall specify that the licensee shall maintain continuous uninterrupted coverage, in the amount specified therein, for the duration of the period during which the license agreement is in effect. The licensee shall maintain on file with the agency a certificate of insurance certifying the coverage required above. The adequacy of the insurance shall be subject to approval by the City Counselor. Failure to maintain liability insurance shall be cause for immediate termination of the license agreement. (Ord. 62233 § 13, 1991.)

23.64.140 Minimum technical specifications.

A. Licensees shall conform to the following minimum specifications:

1. The depth of underground conduit, measured from the top of the conduit to the surface of ground shall be a minimum depth in soil of forty-two (42) inches and at a ditch crossing, a minimum depth of sixty (60) inches.

2. Within any street right-of-way, with the exception of road crossings and driveways, a minimum four (4) inch PVC conduit, with minimum 2 innerducts, 3/4 inch cable shall then be pulled through the conduit in place.

3. Under all road crossings and driveways a minimum four (4) inch black steel pipe will be installed by jacking or boring, maintaining a depth of forty-eight (48) inches below the surface of the road.

4. Trenching shall be promptly backfilled with earth and tamped with a mechanical tamper at six (6) inch lifts, so that the earth is restored to original grade to assure no hazard to vehicular, animal or pedestrian traffic. All open trenches will be properly guarded or barricaded to prevent damage or injury.

5. All cable, where practical, shall be located to cross roadbed at approximately right angles thereto. No cable shall be placed in any culvert or within five (5) feet of the closed point of same.

6. In areas of potential erosion the "plug" method of erosion control shall be used.

7. Licensee shall use the "flagging/identification" system as recommended by the American Public Works Association.

8. All aerial cables and wire shall be installed parallel with existing telephone and electric utility wires.

9. Multiple aerial configurations shall be in parallel arrangement and bundled, in accordance with engineering and safety considerations; and

10. All underground installations shall be in the appropriate size and type of conduit or other enclosures approved by the Agency.

B. However, notwithstanding the requirements of subsection A of this section, the Board of Public Service shall have authority, upon recommendation of the Agency, to allow a licensee to conform to different technical specifications than those contained in said subsection, based upon considerations of location of the installation or upon developments in state-of-the-art methodology, new technologies or construction techniques. Whenever the Board of Public Service approves use of technical specifications which vary from the minimum technical specifications set forth in subsection A of this section, the minimum technical specifications which the licensee must comply with shall be set forth in the license agreement.

C. Licensee shall install and maintain its wires, cables, fixtures, and other equipment in accordance with the current requirements of the National Electrical Safety Code promulgated by the National Bureau of Standards and the National Electrical Code of the National Board of Fire Underwriters and in such a manner that they will not interfere with any installations of the City or of a public utility service the area of the City.

D. No person shall engage in construction, installation, or maintenance of private transmission systems or components thereof unless such person has first procured either a Communications Contractor's or Electrical Contractor's License from the City and unless such person is otherwise properly licensed to do business in the City. It shall be a violation for an owner or operator of a private transmission system to allow construction, installation or maintenance work to be performed on such system by a person other than a licensed Communications or Electrical Contractor. Each day on which such work is performed on a private transmission system by a person other than a licensed Communications or Electrical Contractor shall constitute a separate violation. (Ord. 62233 § 14, 1991.)

23.64.150 Streets and pole attachment use.

A. Operations along streets, alleys, walkways, and sidewalks shall be kept clear of excavated material or other obstructions at all times. Barricades, warning signs and lights, flagmen when necessary shall be provided by the contractor or Licensee. One half of the traveled portion of the street must be open at all times.

B. Damage to banks, ditches, streets, roads, fences, lawns, shrubbery, drives and any other property caused from the equipment and installation of the communication system shall be immediately repaired to the satisfaction of the public authorities having jurisdiction over the property involved, at the sole cost of the Licensee.

C. The Licensee shall comply with all rules and regulations issued by the Board of Public Service governing the construction and installation of communications transmission systems. In addition:

1. Before commencing construction of its communications system in, above, over, under, across, through or in any way connected with the streets, public ways or public places of the City, the Licensee shall first obtain any permits required for such construction by the applicable ordinances of the City or by regulations issued by any of the City's agencies or departments. Applications for permits related to construction of a communications system shall not be considered for approval by the Board of Public Service until after execution of a license agreement hereunder between the City and the applicant. The licensee agreement shall be a condition of application for any permits required for construction.

2. Upon obtaining such permits, the Licensee shall give the Agency written notice within a reasonable time of proposed construction, but in no event shall such notice be given less than twenty-four (24) hours before commencement of construction. The notice required hereunder shall include a proposed schedule for work in the City's streets or other rights of way, measured in linear feet, occupied by licensee's system, and a map showing same.

3. Any person who submits a request for a permit in accordance herewith shall include therein proposed agreements for the use of existing utility poles and conduits, if applicable, with the owner(s) of such facilities to be used or affected by the construction of the proposed communications system.

4. It shall be a violation for any Licensee or any other person to open or otherwise disturb the surface of any street, sidewalk, driveway, public place for any purpose whatsoever related to a communications transmission system without obtaining all permits required by the applicable ordinance of the City or by regulations promulgated by any of the City's departments or agencies. The City further reserves to itself all other remedies, legal or equitable, which are available to it should a Licensee or other person fail to obtain all necessary permits prior to opening or otherwise disturbing the surface of any street, sidewalk, driveway, or public place for purpose whatsoever related to a communications transmission system.

D. Each Licensee shall, at its own cost and expense, and in a manner approved by the City, replace and restore any such pavements, sidewalks, curbing, or other paved areas in as good a condition as before the work involving such disturbance was done and shall restore and replace any other property disturbed, damaged or in any way injured by or on account of its activities to as good as the condition such property was in immediately prior to the disturbance, damage or injury or reimburse its owner for the damage done.

E. Upon the failure of the licensee to properly repair and restore such property to its former condition within a reasonable time after construction, the City or a private property owner may make the repairs and submit a statement of costs to the licensee for reimbursement. Should a Licensee fail to reimburse the City or a private owner within thirty (30) days of submission of such statement to the

Licensee, the City or a private owner may proceed against the bond provided for in Section 23.64.120.

F. The Licensee shall, at its own cost and expense, protect, support, temporarily disconnect, relocate in the same street or other public place, or remove from such street or other public place, any of its property when required to do so by the City because of street or other public excavation, construction, repair, regrading, or grading; traffic conditions; installation of sewers, drains, water pipes, City owned power or signal lines, tracks; vacation or relocation of streets or any other type of structure or improvement of a public agency, or any other type of improvement necessary for the public health, safety or welfare.

G. Nothing in this chapter or any permit issued in accordance herewith, shall be construed as authorizing the Licensee to erect or install new poles or underground conduits in areas serviced by existing poles and conduits. Except that a Licensee may install new conduit where existing conduit in the area is full or otherwise unavailable to the licensee. In such instance, the license agreement shall contain specifications for the manner in which the new conduit is to be installed. The Licensee shall obtain all necessary permits from the relevant departments and agencies of the City before erecting any new poles or underground conduits where none exist or where existing conduit is unavailable or full. Applications for such approval shall be made in the form prescribed by the City.

H. The Licensee shall maintain all wires, conduits, cables and other real and personal property and facilities in good condition, order and repair, and

in safe condition so as not to endanger human life or health or public or private property. If it is necessary for a licensee to open or otherwise obstruct a street to make repairs to its system, the licensee shall, in addition to procuring all permits required for such work under other ordinances or regulations of the City, notify the agency thereof.

I. The Licensee shall keep accurate, complete and current maps and records of its system and facilities which occupy the streets, public ways and public places within the City and shall furnish as soon as they are available three (3) complete copies of such maps and records to the Agency. The Licensee shall also furnish one copy of maps and records to the "one-call" system coordinating group in Missouri.

J. All installation shall be underground in those areas of the City where both telephone and electric utilities' facilities are underground at the time of the installation of the Licensee's communications transmissions system. In areas where both telephone and electric utilities' facilities are above ground at the time of the installation of the Licensees' communications system, the Licensee may install its system above ground on existing utility poles only, upon the condition that at such time as those facilities are placed underground by the telephone and electric utility companies, the Licensee shall likewise place its facilities underground at its sole cost and expense.

K. The Licensee upon reasonable notice by the City shall temporarily or permanently remove, adjust, raise or lower its facilities within the right of way when the City determines that such action is needed for public use of the right-of-way, including

but not limited to the passage of nonstandard vehicles.

L. The Licensee shall obtain written permission of the owner, including the City, of any trees or other vegetation before it trims or prunes the same. (Ord. 62233 § 15, 1991.)

23.64.160 Police power.

Nothing in this chapter or in any license agreement issued in accordance herewith shall be construed as an abrogation by the City of any of its police powers. (Ord. 62233 § 16, 1991.)

23.64.170 Transfers, assignments and subleases.

A. A license issued pursuant hereto shall not be transferred without the prior written authorization of the Board of Public Service. For purposes of this section, a merger or consolidation shall be deemed a transfer or assignment.

B. Nothing in any approval of the Board of Public Service authorizing any transfer of any license issued in accordance herewith shall be construed to waive or release any rights of the City in and to the streets, public ways and public places of the City or as a release of any of the City's police powers.

C. Any transfer of a license approved by the City shall be conditioned upon the transferee's accepting all the terms and conditions of this chapter and execution of an amended license agreement naming the transferee as the Licensee.

D. No Licensee, under this chapter shall have the right or privilege to lease or sublet pole or conduit space or to use them other than for the Licensee's own needs; except that, notwithstanding the contrary

provisions of 68 of Ordinance 29723, this limitation shall not apply to the use of such space by another entity which has executed a license agreement with the City for use of such space. (Ord. 62233 § 17, 1991.)

23.64.180 Retroactivity of provisions.

A. This chapter shall apply to all communications transmission systems installed or under construction within the City on the effective date of this ordinance.

B. Within ninety (90) days of the effective date hereof a person owning or controlling communication transmission system facilities subject to this chapter shall file an application for a license as specified in Section 23.64.050. This period of time may be extended for good cause by the Agency.

C. Failure of such a person to file an application within the time specified shall be a violation and shall also result in the immediate revocation of any existing permits issued by the City allowing such person to occupy any public street, alley, right-of-way and/or public places in relation to use, operation or maintenance of a communications transmission system. Upon revocation of such permits for failure to file an application within the time specified, the City may order the prompt removal of such facilities and seek other redress, both legal and equitable. (Ord. 62233 § 19, 1991.)

(3)

No. 08-626

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

LEVEL 3 COMMUNICATIONS, LLC

Petitioner,

v.

CITY OF ST. LOUIS, MISSOURI

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

Kenneth A. Brunetti
Counsel of Record
Joseph Van Eaton
Matthew K. Schettenhelm
Miller & Van Eaton, PLLC
Suite 1000
1155 Connecticut Ave., N.W.
Washington, DC 20036
(202) 785-0600

Stephen J. Kovac
Daniel J. Emerson
314 City Hall
St. Louis, MO 63103
(314) 622- 3361

Counsel for Respondent City of St. Louis, Missouri

QUESTION PRESENTED

Whether a court should dismiss a claim to preempt local legal requirements under 47 U.S.C. § 253(a) when "a thorough review of the entire record" shows the plaintiff has not demonstrated that the challenged requirements materially interfere with its ability to compete in a fair and balanced market.

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RELEVANT STATUTORY PROVISIONS

This case involves Section 253 of the Telecommunications Act of 1996, 47 U.S.C. § 253. Section 253 is accurately set out in Level 3's Petition, except that Level 3 omits the word "publicly" from the last clause of subsection (c). The clause should read "if the compensation required is *publicly* disclosed by such government." The omission is not material to this dispute.

Also relevant is Section 601(c)(1) of the Telecommunications Act of 1996, 47 U.S.C. § 152 nt. It provides:

> **(c) Federal, State, and local law.--**
>
> **(1) No implied effect**.--This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

STATEMENT OF THE CASE

The Telecommunications Act of 1996 (the "Act") preempts local legal requirements[1] that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Applying the FCC's standard for interpreting Section 253(a), the Eighth Circuit reversed a district court

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[1] In this brief, we use the term "requirements" as short-hand for "statute or regulation, or other State or local legal requirement." 47 U.S.C. § 253(a).

decision that had preempted the City's license fee requirement for the use of the City's rights-of-way. The Eighth Circuit ruled that a "thorough review of the entire record" showed "insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations." Pet. App. 32a. Summary judgment was ultimately granted in the City's favor because, "on the existing record" neither the license agreement nor the City's ordinance "prohibits or effectively prohibits Level 3's ability to provide telecommunications services." Pet. App. 22a.

1. A telecommunications service provider that wishes to provide service in St. Louis may do so in one of two ways. A company certified by the Missouri Public Service Commission ("PSC") to provide both local or exchange service, and toll or long distance service to customers in the City may choose to operate under Ch. 23.34 of the St. Louis Revised Code ("Ch. 23.34"), under which it pays a 10% gross receipts tax on local services. A company that opts to operate under Ch. 23.34 is considered to be franchised by the City. Court of Appeals Joint Appendix ("C.A.J.A.") 447.[2]

A telecommunications service provider that does not choose to operate pursuant to Ch. 23.34

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[2] Level 3 errs when it states, *e.g.*, Pet. 6, that Southwestern Bell Telephone Company ("SWBT"), is the only company authorized to operate under Ch. 23.34. There are three companies presently operating under a Ch. 23.34 franchise, including SWBT, and others may be eligible to do so. C.A.J.A. 450.

must obtain a license and pay a license fee under Ch. 23.64, titled "Communications Transmission Systems" (the "Ordinance" or "Ch. 23.64"). The Ordinance was adopted in 1991 in response to changes in the telecommunications industry that were resulting in new companies entering the market that were not anticipated in 1942, when Section 23.34 was adopted.[3]

Petitioner's Statement mischaracterizes the Ordinance, as found by the courts below. Broadly speaking, the Ordinance has four parts. First, the Ordinance establishes a process for obtaining a license. The City employs a one-page license application, which calls for minimal information about the applicant, an engineering site plan showing the proposed location, as well as a description of the size and types of facilities the applicant proposes to install (Ch. 23.64.050(A)). C.A.J.A. 451, 469-71, 529. This information allows the City to identify the entity responsible for the facilities, and provides initial information helpful in coordinating construction with other projects in the public rights-of-way. C.A.J.A. 469-71.

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[3] Ch. 23.34 only imposes a tax on local services. The tax is in lieu of a franchise fee for use of the rights-of-way. When Ch. 23.34 was adopted, one phone company, AT&T, provided both local services and interstate services. Now, of course, there are companies that provide only non-local services, which would pay nothing under Ch. 23.34. In order to ensure that these companies pay some compensation for use of the rights-of-way, and to address other issues presented by the new entrants into the market, the City enacted Ch. 23.64. C.A.J.A. 447.

Provided that a company is qualified under the Ordinance and its license application is complete, the City's Board of Public Service "shall approve execution of a license agreement with the applicant by the [City's Communications Division.]" 23.64.050(C). There is no evidence that the Communications Division has ever chosen not to execute a license agreement after it has been directed to do so by the City's Board of Public Service.[4]

Second, the Ordinance establishes requirements related to the management of the rights-of-way. Among other things, the Ordinance requires that a provider use only contractors who hold standard City business licenses for constructing, installing, or maintaining network facilities in the City. Ch. 23.64.140(D). As the district court noted, this provision is a "reasonable public safety requirement" that protects the City and other right-of-way users "from dangers arising from . . . work undertaken by unqualified contractors. Pet. App. 66a. The Ordinance also imposes what the district court found were "standard tools" for right-of-way management: bond, insurance, and indemnification requirements protecting against damage to the City and the public as a result of

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[4] Level 3 errs when it claims at Pet. 6 the City has unfettered discretion to deny a license request or withhold permits. Level 3 relies upon 23.64.080(G) for the premise that the City can withhold permits to a licensee. That section has nothing to do with permits; it addresses the installation of municipal conduit.

construction and occupation of the rights-of-way. Pet. App. 63A.[5]

The Ordinance also contains minimum technical requirements that allow the City to coordinate the placement of facilities in the rights-of-way. Ch. 23.64.140. Further, to minimize disruption and the number of cuts in the rights-of-way, the Ordinance requires a licensee to install conduit for the City if – and *only* if – the licensee is already engaging in construction. Ch. 23.64.080(G); C.A.J.A. 458. Should it exercise this option, the City is required to pay 100% of direct and indirect costs of the installation, including materials, labor, and additional construction expenses. *Id.*

Third, the Ordinance requires a licensee to pay a license fee as compensation for use of the rights-of-way. Ch. 23.64.090.

Fourth, the Ordinance contains a number of enforcement/monitoring provisions. For example, Ch. 23.64.170 requires the City's consent before a license is transferred to another entity. This ensures

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[5] Level 3 erroneously suggests that the City requires a telecommunications provider to indemnify the City for the City's own negligence, Pet. 5. Damages must arise out of the "installation, use, operation, maintenance or condition of [Level 3's] communications transmission system." 23.64.130(B). It is more accurate to state that Level 3 may not escape responsibility for its own acts and omissions by claiming contributory negligence. For example, if Level 3 uses an unqualified contractor in violation of the Ordinance, and harm results, Level 3 may not avoid its duty to indemnify by claiming the City was negligent in failing to enforce the Ordinance.

that the City knows who is in control of the various facilities in the rights-of-way and confirms that the person operating and maintaining a system in the rights-of-way accepts responsibility for doing so. C.A.J.A. 481-82.

The Ordinance also contains provisions that permit the City to revoke a license but those provisions only apply in the event that the licensee violates the Ordinance or the License Agreement. The district court found that the revocation provisions have built-in notice-and-opportunity-to-cure protections that ensure a licensee's due process. Pet. App. 59a.[6]

2. Under the Ordinance, competition in the St. Louis telecommunications market has flourished. When the City adopted the Ordinance, four telecommunications providers operated in the City: Southwestern Bell, AT&T, MCI, and Sprint. C.A.J.A. 446. At the close of the record in this case, there were sixteen facilities-based service providers operating in the City.

Among those who have successfully entered the market pursuant to the Ordinance is Petitioner Level 3. Level 3 and the City negotiated the terms of a license agreement over the course of several months. *See, generally*, C.A.J.A. 541-606. The relaxed pace of the negotiations was due at least in part to the fact that at the time, Level 3 was awaiting its PSC certificate of authority, which was

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[6] Level 3 thus errs in its Statement in claiming the City has "unfettered discretion" to revoke.

not issued until shortly before the license agreement was finalized. C.A.J.A. 909-17. Indeed, the correspondence between Level 3 and the City reflects no urgency on the part of the company. C.A.J.A. 224-26, 562-63, 597-600, 605-06. The City and Level 3 formally entered into a license agreement on April 13, 1999. C.A.J.A. 484. Under the contract, Level 3 promised to pay a linear foot charge in exchange for the valuable right to place its fiber optic cable and related facilities in the City's rights-of-way. C.A.J.A. 493-94.

Since 1999, the company has continuously provided service in the City. C.A.J.A. 384-85. The company now occupies approximately 176,500 linear feet of City rights-of-way. C.A.J.A. 192. The City has never attempted to limit in any way the types of telecommunications services that Level 3 can provide, C.A.J.A. 416, and in fact the company may provide any services in the City that are authorized by the PSC. C.A.J.A. 397-98. Since 1999, Level 3 has delivered a number of new services in the City. C.A.J.A. 424-25, 711-17.

Level 3's revenues in the City are disputed. The company itself admitted that revenues attributed to the St. Louis market were in excess of $38 million from 1999 through 2004 and just under $11 million in 2004 alone. C.A.J.A. 421. The annual license fee the company paid to the City in fiscal year 2004 was, by contrast, $140,000. C.A.J.A. 418. The basis for Level 3's claimed revenues of only $80,000 per year from customers in St. Louis is unclear. The number apparently includes only

services that take place within the St. Louis market and excludes revenues where a call or service may originate in St. Louis and terminate elsewhere, or vice versa, even where the transaction uses Level 3 facilities in St. Louis. C.A.J.A. 426-427. Level 3 also admitted that the company does not track specific revenues by market. C.A.J.A. 421.

3. In late July 2003, Level 3 stopped paying license fees and in July 2004, the company filed suit against the City seeking a declaration that the requirements in Chapter 23.64 and the license agreement are preempted by 47 U.S.C. § 253, and violate 42 U.S.C. § 1983 and state law. At around the same time, the City filed a state court declaratory judgment action asking that the license agreement be declared valid, C.A.J.A. 69-74, which was removed to the district court. The district court then consolidated the cases. C.A.J.A. 99-100. Ultimately, the parties filed cross-motions for summary judgment.

During the course of discovery, the City asked Level 3 to identify what services it was being or had been prohibited or effectively prohibited from providing by the Ordinance or the license agreement under which it had been operating for five years. No prohibitory effects were identified. According to Level 3, "it cannot be determined what services Level 3 might have provided or developed using the money that was otherwise paid to St. Louis under the licensing agreement, and whether those hypothetical services would have been developed in

St. Louis or elsewhere." C.A.J.A. 384.[7] The company "did not explore possible alternative uses of the funds." C.A.J.A. 384.

In analyzing Level 3's claims, the district court largely relied on *City of Auburn v. Qwest*, 260 F.3d 1160, 1176 (9th Cir. 2001) (since overturned by *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 577 (9th Cir. 2008) (*en banc*)) to find that the City's requirements ran afoul of Section 253(a). Pet. App. 48a-49a. Without analyzing the effect of the City's legal requirements on Level 3, the district court declared that it "believes" the provisions "have the effect of prohibiting" service under the statute. Pet. App. 49a. The court then turned to the safe harbor provided by Section 253(c), Pet. App. 50a, and found that the City's fee requirement was not saved from preemption because it was not limited to the City's costs. Pet. App. 54a. The court concluded, however, that each of the challenged non-fee requirements were protected as right-of-way management provisions and therefore not preempted. Pet. App. 56a-67a.

Both parties appealed the decision to the Eighth Circuit. Based on *Auburn* and its progeny, Level 3 defended the district court's decision by claiming that Section 253(a) preempts any local requirement that "may prohibit" the ability to

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[7] *See also* C.A.J.A. 442 ("Level 3 cannot state with specificity what additional services it might have provided had it been able to freely use the money that it was forced to pay to the City for access to the public rights-of-way.")

provide service. Level 3 Br. 22 (May 12, 2006). The Eighth Circuit disagreed. Pet. App. 30a. The court noted that "no reading results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services." Pet. App. 30a. Instead, the court turned to the guidance provided by the FCC:

> [A] plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition. The plaintiff need not show a complete or insurmountable prohibition, but it must show an existing material interference with the ability to compete in a fair and balanced market.

Pet. App. 31a (internal citation omitted) (citing *Cal. Payphone Ass'n*, 12 F.C.C.R. 14,191, 14,206 ¶ 31 (July 17, 1997).

Applying this standard, the court found that Level 3 had not carried its burden of proof under Section 253(a). Pet. App. 32a. The court noted that Level 3 "cannot state with specificity what additional services it might have provided had it been able to freely use the money that it was forced to pay to the City for access to the public rights-of-way." *Id.* In addition, the court conducted a "thorough review of the entire record," and found "insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations." *Id.*

The court also ruled that Section 253(c) does not independently limit local government action. Pet. App. 28a-29a. The court reasoned that "requiring proof of a violation of subsection (a) before moving to subsection (c) is the only interpretation supportable by a plain reading of the section as a whole." Pet. App. 29a. Level 3 did not argue otherwise before the court of appeals.

Level 3 petitioned for panel rehearing and for rehearing *en banc*. The court of appeals denied the petition. Pet. App. E.

On remand, the district court entered summary judgment for the City (Pet. App. B), and the Eighth Circuit affirmed (Pet. App. A).

REASONS FOR DENYING THE PETITION

As we show in Part I, the Eighth Circuit's conclusion was dictated by Level 3's failure to show that the challenged ordinance has any material effect upon it. No appellate court has held that Section 253 permits a court to preempt a local law at the behest of an entity already competing in a competitive market if that entity can identify no "effect" of a challenged law on its ability to provide service.

Nonetheless, Level 3 contends that the interpretation of Section 253 is plagued by a "widespread and entrenched" conflict that is "ever-expanding" as to what it means to "prohibit" or "have the effect of prohibiting" the ability of an entity to provide telecommunications services. Pet. 11, 24. As we explain in Part II, while an early Ninth

Circuit decision, *Auburn*, misread Section 253(a)'s plain language, other courts of appeals have read Section 253 in accord with Congress's language and intent, and with the interpretation of the FCC. The Eighth Circuit's decision reflects this reading. Based largely on the decision below, the Ninth Circuit recently overturned *Auburn* in *County of San Diego*. There is no significant, remaining conflict among the courts of appeals regarding the interpretation of Section 253 that would dictate a different result on these facts. This is therefore not a case that requires the Court's intervention.

Finally, as we show in Part III, there is no significant conflict among the circuits regarding the question of whether Section 253(c) has independent preemptive force, or whether it only operates as a safe harbor. For some years, the courts of appeals have adopted the latter view, and the FCC is also of that view. In addition, because the decision below did not interpret or apply Section 253(c), the Court should not reach this issue in the first instance.

I. The Eighth Circuit's Decision Properly Applied Section 253(a) To the Facts After a Review of the Entire Record Showed No Actionable Claim.

A. Section 253(a) Must Be Read To Preempt Only Requirements That "Prohibit or Have the Effect of Prohibiting" the Ability To Provide Service.

Section 253 must be read to preempt local law narrowly, and in accordance with its plain language. By its terms, Section 253 preempts only state and local requirements that "prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications service. This language must be read narrowly – not only pursuant to the Court's canons of preemption, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992);[8] but also because Congress specifically so instructed in the Act itself. Section 601(c) states that the Act may only be read to preempt local or state laws as "expressly so provided." 47 U.S.C. § 152 nt. Rather than reading Section 253 in strict accordance with its terms, Level 3 criticizes the Eighth Circuit and asserts that Section 253 must be read so that it promotes competition. In Level 3's view, this requires a broad preemption of any requirement that may be characterized as an "obstacle" to competition, even where there is no showing that the alleged "obstacle"

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[8] Courts must accept "the reading that disfavors preemption," *Altria Group v. Good*, ___ U.S. ___, 2008 WL 5204477 (2008).

has a material impact on the Plaintiff. *See, e.g.*, Pet. at 3.

However, the preemptive sweep of Section 253(a)'s plain language cannot be broadened merely to promote the abstract notion of competition. The Court came to a similar conclusion in finding that the FCC could not depart from the "ordinary and fair" meaning of "impair" in Section 251(d)(2)(B), even though the agency believed a broader definition would speed competition. *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999). Congress's use of "prohibit or have the effect of prohibiting" must be given a meaning that reflects the use of those terms, rather than the less demanding "impair" standard in Section 251(d)(2)(B) or "impede" standard in Section 228(g)(4). *Cipollone*, 505 U.S. at 516 (1992).[9]

Nor can Level 3 otherwise justify departure from Section 253(a)'s plain language by referring to the general purposes of the Act. "[I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). That observation is particularly apt here,

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[9] Level 3 errs in arguing that the Eighth Circuit erred by looking only to the effect on "the specific provider asserting preemption." Pet. 13. No circuit court has looked to an "effect" of a local requirement on an entity other than the plaintiff, perhaps because such an analysis would raise serious concerns under Article III. Even if such an analysis were appropriate, it is irrelevant here, as Level 3 did not show the effect of the City's requirements on any other entity.

given that the extended legislative history of Section 253 shows Congress's specific purpose is well-served through a focus on requirements that "prohibit" or have that "effect." As the First Circuit observed, Section 253(a), as adopted, was primarily concerned with uprooting regulatory systems that granted telephone monopolies:

> Congress apparently feared that some states and municipalities might prefer to maintain monopoly status of certain providers, on the belief that a single regulated provider would provide better or more universal service. § 253(a) takes that choice away from them, thus preventing state and local governments from standing in the way of Congress' new free market vision.

Cablevision of Boston, Inc. v. Pub. Improvement Comm'n, 184 F.3d 88, 97-98 (1st Cir. 1999); *see also Iowa Utils. Bd.*, 525 U.S. at 405 (Thomas, J., concurring in part, dissenting in part).

In fact, Level 3's argument is at odds with and is based upon a misreading of the legislative history. At Pet. 20, for example, Level 3 relies on a statement by Sen. Pressler for the proposition that the Act guaranteed "uniformity" and prevented providers from facing the "uncertainty of not knowing what every City will do." 141 Cong. Rec. S8176 (June 12, 1995). Sen. Pressler was speaking in favor of a version of Section 253 that did not pass, and that gave the FCC broad authority over all aspects of state and local regulatory systems. Better reflecting

the purpose of the Act is this statement from the House debate:

> As Republicans, we should be with our local city mayors, our local city councils, because we are for true Federalism, we are for returning power as close to the people as possible, and that is what the Stupak-Barton amendment does. It does not let the city governments prohibit entry of telecommunications services providers for pass through or for providing service to their communities. . . . [but] The Federal Government has absolutely no business telling State and local government how to price access to their local right-of-way. We should vote for localism and vote against any kind of federal price controls.

141 Cong Rec. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Barton); *see also id.*, S8306 (Statement of Sen. Gorton). Section 253 thus was not intended to uproot any and all local requirements that might *affect* a telecommunications company.

B. To Prove a Requirement Has the "Effect of Prohibiting," a Plaintiff Must Show a Material Impact.

Since the City's requirements did not "prohibit" Level 3 from providing service, the Eighth Circuit considered whether the requirements have a prohibitory "effect" on the company. The court

adopted the FCC's standard:[10] "The plaintiff need not show a complete or insurmountable prohibition, but it must show an existing material interference with the ability to compete in a fair and balanced market." Pet. App. 31a (citing *Cal. Payphone* 12 F.C.C.R. at 14206 ¶ 31.[11]

Under this test, as interpreted by the FCC, a fact-finder assesses the "practical effect" of a requirement. *Cal. Payphone*, 12 F.C.C.R. at 14204 ¶ 27. An evidentiary record is necessary in most cases:

> Parties seeking preemption of a local legal requirement such as the . . . Ordinance must supply us with *credible* and *probative evidence* that the challenged requirement

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[10] Even where statutory language is unambiguous, as here, courts may look to administrative agencies for guidance. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The FCC has been required to interpret Section 253(a) in several contested proceedings. That is because, in section 253(d), the FCC is given specific authority to receive complaints from telecommunications providers, and to determine whether a local ordinance or regulation prohibits or has the effect of prohibiting a provider's ability to provide service. However, the FCC cannot decide whether a local or state requirement is protected from preemption by Section 253(c). That is left to the courts.

[11] The FCC has defined a "prohibition" as a requirement that "expressly precluded an entity or class of entities from providing a particular service in a particular area," *Cal. Payphone*, 12 F.C.C.R. at 14206 ¶ 29. There is no serious contention that the St. Louis ordinance contains a direct "prohibition."

> falls within the proscription of Section 253(a) without meeting the requirements of section 253(b) and/or (c).

In re TCI Cablevision of Oakland County, Inc., Memorandum Opinion and Order, 12 F.C.C.R. 21396 at 21440, ¶ 101 (1997) (emphasis added). The FCC's *Suggested Guidelines for Petitions for Ruling under Section 253 of the Communications Act*, 13 F.C.C.R. 22970 (1998), specifically ask the complainant to identify:

> *** What *specific telecommunications service or services* is the petitioner prohibited or effectively prohibited from providing? . . .
>
> *** What are the *factual circumstances* that cause the petitioner to be denied the ability to offer the relevant telecommunications service or services? . . .

The FCC has consistently required evidence that a provision, *as applied*, has prohibitory effects, and rejected challenges based on the mere possibility that authority *might* be exercised in a manner that arguably "prohibits or has the effect of prohibiting" the ability of a provider to offer services. *Cal. Payphone*, 12 F.C.C.R. at 14209 ¶ 38 (emphasis added). The FCC accordingly rejected a Section 253 petition because the complainant had failed to show that the challenged regulation made it "impractical and uneconomic" or eliminated any "commercially viable opportunity" to enter the market. 12 F.C.C.R.

at 14210 ¶ 41.[12] As the FCC's cases demonstrate, this reading of Section 253 provides ample protection against requirements that actually prohibit or "have the effect of prohibiting" market entry – it does not, as Level 3 claims, limit Section 253(a) to protecting against "far-fetched and entirely imaginary" ordinances.[13] As discussed, *infra*, the FCC test has been adopted in the First, Second, Eighth, Ninth, and Tenth Circuits.

C. The Eighth Circuit Properly Found That Level 3 Showed No Prohibitory "Effect."

The record before the Eighth Circuit made the resolution of this case rather simple. As an initial

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[12] This applies the primary and ordinary meaning of the term "prohibit," which is to "forbid by law," and not merely "impede," as Level 3 would have it. Black's Law Dictionary, 8th Ed. 2004.

[13] *In re Petition of Pittencrieff Communications, Inc.*, 12 F.C.C.R. 19491 (1997) (striking down Texas law based on evidence that it made competitive entry commercially unviable). Level 3 criticizes the Ninth Circuit for giving what Level 3 claims are far-fetched examples of requirements that could be deemed "effective prohibitions" on a *facial* challenge. The Ninth Circuit never claimed that only such requirements were "effective prohibitions." Rather, the point of its examples was that, on a *facial challenge*, it would have to be clear that an ordinance requirement would lead to a prohibition in all circumstances. This is, of course, a necessary result of the application of this Court's "facial challenge" rules, *United States v. Salerno*, 481 U.S. 739, 745 (1987). This is hardly grounds for criticism. In fact, elsewhere in the decision, *Sprint* suggested that an Ordinance that "impose[s] an excessively long waiting period" would "have the effect of prohibiting" under Section 253(a). 543 F.3d at 580.

matter, any analysis must begin with the recognition that franchising ordinances are in and of themselves *not* prohibitory or effectively prohibitory. Rather, by their nature such ordinances *permit* a company to use and occupy valuable property which it does not own. *In re Classic Telephone*, 11 F.C.C.R. 13082, 13097 ¶ 28 (1996). Because the City's requirements did not "prohibit" on their face, the question before the Eighth Circuit was whether the requirements nevertheless have "the effect of prohibiting" Level 3's ability to provide services. The court looked to the record. As indicated in the Statement of the Case, Level 3 was in the market, and had been operating pursuant to the St. Louis ordinance for some years and was rolling out new services in the City. There was no evidence that it was being forced to leave the market, or to cut back service. Level 3 was unable to identify any service it had been prohibited or effectively prohibited from providing, and admitted that, "it cannot be determined what services Level 3 might have provided or developed" with the money it paid the City. C.A.J.A. 384. The City further showed that it has never attempted to limit the types of telecommunications services that Level 3 can provide, C.A.J.A. 416. C.A.J.A. 397-98. It showed, more generally, that the market was highly competitive.

Level 3's response to this evidence was essentially to demur. It made general claims that the ordinance conferred "unfettered discretion" on the City (the district court found it did not), and asserted as a general matter that the ordinance was "burdensome," without evidence that it was. The

extent of the demurrer is emphasized by the Petition at 19, where Level 3 argues that the Eighth Circuit should have considered the impact of the City's right-of-way fees had they been adopted in every community served by Level 3. But Level 3 never presented such evidence, as should be obvious from the Petition's citation of a summary judgment motion filed in another case.[14] Ultimately, Level 3 did not support the allegations in it complaint, or rebut the evidence showing those allegations were groundless.

To be sure, Level 3 did complain that the annual license fee, approximately $140,000 in 2004, was in and of itself prohibitory, but the evidence was to the contrary. Had the fee truly been prohibitory

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[14] Certiorari cannot be justified based on facts never presented. *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 488 n.3 (1986) it is hardly a convincing citation in any case. First, the $2.79 overstates the fee in St. Louis as shown on the record, (C.A.J.A. 494, 379). Second, the fee in St. Louis was based on the value of the real estate in St. Louis, which is justifiably higher than in surrounding areas, just as other real estate rents are higher. C.A.J.A. 631-632. Level 3's claim that rents must be uniform is bad (and unsupported) economics. Third, the record shows how much Level 3 pays nationwide in right-of-way fees: $22 million. By way of comparison, the annual interest the company pays on debt service was $485 million in 2004. C.A.J.A. 424. There is no reason for the Eighth Circuit to suppose that every jurisdiction would or could impose the St. Louis fee. What the Level 3 argument does reveal is the essence of its approach to Section 253: Level 3 is suggesting that it must be allowed to claim a prohibition not based on the facts, but based on what might happen if the facts were different. This approach is obviously hard to square with Article III jurisprudence

one would have expected Level 3 to raise the issue much sooner, and one would have expected Level 3 to be able to identify some impact from a fee it had paid for five years.

However, the main thrust of Level 3's argument (largely submerged in its Petition) was that Section 253(a) preempts any local requirement that "*may* [that is, might] prohibit" the ability of any entity to provide service under any hypothetical circumstances. Having properly rejected that argument for reasons explained *supra*, the court of appeals conducted a "thorough review of the entire record" and properly found "insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations." Pet. App. 32a.[15]

Level 3 is left to resort to a series of overblown claims as to the consequences that follow from the Eighth Circuit's holding. Level 3 argues that "under the Eighth Circuit's view, a local government's assessment of any outrageous and competition-inhibiting charge does not amount to a preempted 'prohibition' under Section 253(a) as long as it is paid, regardless of the disincentives and financial dislocations its creates." Pet. 16. That is not the case. What the court found relevant was the admission that the company could not identify any

[15] Level 3 complains that the Eighth Circuit did not "accord[] . . . significance" to various facts. Pet. 18. Given Level 3's effective admission that the ordinance had no impact, however, the Eighth Circuit's findings are more than amply justified.

impact. Pet. App. 32a. Level 3 also claims that under the Eighth Circuit's decision, it could not bring a claim unless required to "abandon" the local market, Pet. 17, or if challenged provisions "literally preclude the plaintiff telecommunications provider from offering services." Pet. 19-20. But the decision expressly states otherwise: it was based on the whole record, and the failure of *this* company to show any material impact. Pet. 32a. Nor is it accurate that the Eighth Circuit's analysis "began and ended with the question whether Level 3 . . . determined to construct its fiber-optic network and to provide services". Pet. 18. It began and ended with the record, which contained more than ample evidence that showed there was *no* prohibition, "effective" or otherwise.

Level 3 claims that by requiring a showing of a prohibition or effective prohibition the Eighth Circuit reads "Section 253(c) out of the statute." (Pet. 20) The reverse is true. Under Level 3's reading, all local laws and regulations would be preempted unless they fell within the safe harbor of Section 253(c) – thus rendering the language of Section 253(a) surplusage. The court's reading gives effect to all parts of Section 253. By requiring a plaintiff to show, first, a prohibition or effective prohibition, and then permitting a locality to show that the challenged regulations fall within one or both of the safe harbors established by Sections 253(b)-(c), a court gives effect to all provisions of the act, as the FCC has consistently recognized. *Classic*, *supra*.

Nor is there a reason to create an exception to this rule where the challenge is to a provision requiring payment of compensation. Pet. 21. According to Level 3, a compensation scheme that is not based on costs ought to be treated as *per se* prohibitory. This makes no sense, economically or legally. Under that theory, *any* fee – 1 penny per year, for example – would "have the effect of prohibiting" the ability to provide service. In free markets, prices are not necessarily based on costs, as Level 3 uses the term; so it is unclear why a non-cost-based rate would be treated as inherently prohibitory.[16] Indeed, the basic thrust of the argument assumes Congress intended to establish a single, unified rate-regulation system for local and state governments, and to dictate, *sub silentio*, what could be charged for rights-of-way. Neither Section 253's plain language nor its legislative history supports such a far-reaching interpretation.[17]

To be sure, there may be cases where a prohibitory "effect" may be established with very

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[16] Landlord A may have a house that was acquired at no cost (through inheritance, for example) and requires nothing to maintain; Landlord B, next door, may have purchased the house at a very high cost, which requires much more money to maintain. In a free market, one would not consider Landlord A to be "prohibiting" renters by charging the going rate for rentals, or by charging the same amount as Landlord B.

[17] This Court has long recognized that localities may charge the fair value rent for use of rights-of-way. *St. Louis v. Western Union Telegraph*, 148 U.S. 92 (1892). Even assuming Congress had the power to eliminate this local authority, it is impossible to imagine Congress doing so in so cryptic a fashion.

little evidence – but this is not such a case. There is no reason for the Court to grant certiorari to review the Eighth Circuit's application of a standard it adopted in common with the FCC and other courts of appeals to a record wholly lacking in relevant facts supporting the claim.

II. The Interpretation of Section 253(a) Has Coalesced Around the Statute's Plain Language and the FCC's Guidance.

At its core, this case is thus about Level 3's failure to offer basic proof in the factual record. Contrary to Level 3's claim, the Eighth Circuit did not break new ground in Section 253(a) law, or create a conflict among the Circuits that requires the intervention of this Court.

The interpretation of Section 253(a) in the circuit courts and at the FCC has coalesced around the statute's plain language. To be sure, the Eighth Circuit "acknowledge[d] that other courts hold otherwise and *suggest* that *possible* prohibition will suffice." Pet. App. 29a (second emphasis in original) (citing the First, Ninth, and Tenth Circuits).[18] However, when the rulings in those Circuits are examined, it becomes obvious – particularly after the *Auburn* reversal – that there is no conflict as to the standards that determine the outcome of this case.

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[18] Level 3 also alleges a conflict with the Second Circuit. Pet. 25.

A. The Reversal of *Auburn* Eliminated the Case That May Have Presented a Real Conflict.

In *Auburn*, the Ninth Circuit stated that "Section 253(a) preempts regulations that not only 'prohibit' outright the ability of any entity to provide telecommunications services, but also those that '*may* . . . have the effect of prohibiting' the provision of such services." *Id.* (quoting *Bell Atlantic v. Prince George's County*, 49 F. Supp. 2d 805, 814 (D. Md. 1999), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000)) (emphasis added). As convenient linguistic shorthand, the "may prohibit" formula is not problematic. It has been used by the FCC and other courts. However, in the Ninth Circuit, the formulation was soon applied as a substantive rule of interpretation. In *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004), the appellate panel concluded that under the "may prohibit" test, Qwest was not required to make an actual showing of "a single telecommunications service that it is effectively prohibited from providing." On remand, the district court noted the potential breadth of a "may prohibit" standard read literally:

> [A]lmost any regulation, considered in the abstract without factual context, could be depicted as potentially prohibiting a telecommunications service. A $5.00 application fee would be prohibitory if the applicant had only $2.00. Unless the preemption analysis is somehow connected

> to reality, a telecommunications provider could rely on purely hypothetical scenarios to establish a violation of § 253(a).

Qwest v. Portland, 2006 WL 2679543 (D. Or. 2006). The district court struggled to define the "may prohibit" test in a way that would be consistent with the Ninth Circuit's precedents, and yet avoid making Section 253(a) a meaningless test in conflict with the FCC's decisions, *id.*; but it was quite clear that *Auburn* was, at the very least, creating substantial application problems that raised Article III concerns. Nevertheless, plaintiffs in that case and others urged the Ninth Circuit to confirm that under *Auburn*, a prohibition could be based on speculation, without proof of effect.[19]

Under a "preemption by speculation" test, there would have been a clear conflict between the Ninth Circuit and the Eighth Circuit. However, in *County of San Diego*, 543 F.3d 571, the Ninth Circuit *en banc* concluded that there was no room for a substantive "may prohibit" standard:

> In context, it is clear that Congress' use of the word "may" works in tandem with the negative modifier "[n]o" to convey the meaning that "state and local regulations

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[19] This was the approach taken by Level 3 in this case. The district court cited *Auburn* and the "may prohibit" test, and found a Section 253(a) violation without looking for any prohibitive "effect." Pet. App. 47a-49a. Instead, the court declared that it "believes" the City's requirements to be prohibitive when considered as a whole, without examining their impact on Level 3. Pet. App. 49a.

> shall not prohibit or have the effect of prohibiting telecommunications service." Our previous interpretation of the word "may" as meaning "might possibly" is incorrect. We therefore overrule *Auburn* and join the Eighth Circuit in holding that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition."

543 F.3d at 577. The court noted that its revised interpretation of Section 253(a) was consistent with the FCC's. *Id.* at 578.

B. The Decision in This Case Does Not Present a Conflict With Other Appellate Decisions on Section 253(a).

Level 3 contends that there is nonetheless a conflict between the test adopted by the Eighth Circuit for finding a requirement has the "effect of prohibiting", and the test adopted by the First, Second, and Tenth Circuits, where (Level 3 claims) "ordinance provisions like those imposed by St. Louis are preempted *whenever* they impose a substantial burden or cost – albeit a surmountable one – on the telecommunications provider." Pet. 24, 28 (emphasis added). In other words, according to Level 3, "a substantial burden or cost" has, as a matter of law, the "effect of prohibiting" even if a defendant shows that the challenged requirements have no prohibitory "effect" whatsoever. That is not what the cases say: none found a violation of Section 253(a) in the face of evidence that the challenged ordinance

had no material "effect" on the plaintiffs. In each case, the appellate courts relied on the FCC's test adopted by the Eighth Circuit, and only preempted after concluding, based on record evidence, that the applicable requirements "prohibit or have the effect of prohibiting" the ability to provide service. While the cases cited *Auburn*, none adopted or applied the "preemption by speculation" test rejected in *San Diego*. None purported to expand the statute beyond its plain language.[20]

* * *

We begin with the Second Circuit. In *TCG N.Y. Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002), the Second Circuit applied the FCC's "materially inhibits or limits" test to preempt various provisions of the City of White Plains' ordinance under Section 253. 305 F.3d at 76 (quoting *Cal. Payphone*, 12 F.C.C.R. at 14209 ¶ 31). In that case, TCG had unsuccessfully negotiated for 18 months to obtain a franchise to provide services in the City. *Id.* at 71-72. The Second Circuit found a

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[20] Level 3 belittles the notion that Section 253(a) can be interpreted in accordance with its "plain language." There are certainly complexities involved in interpreting Section 253(a), as this Court recognized in *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132 (2004) (finding that the term "ability" complicates the interpretation of Section 253(a)). However those complexities are not implicated by this decision, which boils down to deciding that Level 3 was required to make an adequate showing that it was prohibited or effectively prohibited from providing service. The question of whether a prohibition or effective prohibition is required *is* decided by the plain language of the provision, and that language cannot be ignored.

Section 253(a) violation based on two factors, including the City's "right to reject any [franchise] application based on any 'public interest factors . . . that are deemed pertinent by the City,'" and the City's "extensive delays" in processing TCG's franchise application. *Id.* at 76. Thus, there was evidence that the City had exercised its discretion to cause the very harm that was at the center of the suit – the denial of TCG's market entry.

In the present case, Level 3 has demonstrated no such prohibitory "effect." Level 3's repeated references to negotiating delays are inaccurate, C.A.J.A. 541-606, and more importantly, irrelevant to the current dispute, as the company is complaining about the terms under which it is now *operating* in the market – not its initial application, which was granted long ago. Moreover, in contrast to *White Plains*, where the City could reject a franchise application for undefined public interest factors, the City of St. Louis can only reject an application if it is incomplete or if the proposed use of the rights-of-way is inconsistent with the requirements of Chapter 23.64 (*i.e.* a proposal to provide cable services as opposed to telecommunications services). Ch. 23.64.050(B).

There is also no conflict with the Tenth Circuit's decision in *Qwest Corp. v. Santa Fe*, 380 F.3d 1258 (10th Cir. 2004). There, applying the same "materially inhibit" standard, *id.* at 1271, the court made four findings. First, it declared that "the mere naked requirement of a registration or lease with the city is not prohibitive within the meaning of the

statute." *Id.* at 1269. Second, the court held that the City's cost-based fees did not run afoul of the statute. *Id.* Third, it held that the City had improperly retained the right to deny an application on any basis and to seek any information, without any standards or limits. This, the court stated, amounted to unlawful "unfettered discretion" inconsistent with Section 253(a). *Id.* at 1270, n.9. Finally, the court ruled that rent and appraisal provisions of the Ordinance ran afoul of Section 253(a) because they "create a massive increase in cost" for providers over the existing fee structure. *Id.* at 1271.

There is no conflict between *Santa Fe* and the Eighth Circuit's decision that justifies certiorari. In *Santa Fe*, unlike this case, the provider presented evidence that a proposed change in the law would result in massive increases in the cost of using the rights-of-way. Level 3 claims that this means that under *Santa Fe* any "substantial burden" is a *per se* violation of Section 253(a), regardless of contrary evidence regarding the burden's "effect." Pet. 28. That was not the holding of the court: as far as the record shows, the evidence presented by the provider as to the impact of the ordinance was largely unchallenged and there was no countervailing evidence comparable to that presented by the City here. At most then, it can be said that the Tenth Circuit concluded that *in the absence countervailing information*, proof of a massive increase in costs can be enough to show a requirement has a prohibitory "effect." Here, by contrast, Level 3 had been paying the license fee for five years before challenging it in

2004. The fee is also less than what Level 3 pays in other jurisdictions, C.A..J.A. 379, 428, and well within the range of fees paid by Level 3 and other providers for use of a right-of-way or transportation corridor nationwide. C.A.J.A. 621-642. The Tenth Circuit never suggested a prohibition could be found under such circumstances.

Level 3 tries to create a conflict with *Santa Fe* by arguing that St. Louis had the same "unfettered discretion" Santa Fe had. The district court in this case concluded otherwise. Pet. 57a-58a. The record shows that the City's discretion is not unfettered, and certainly not comparable to discretion reserved in the *Santa Fe* provisions the Tenth Circuit found troubling.[21]

The ruling in *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006), is also not in conflict with this case. There, the First Circuit preempted a municipal ordinance that required the payment of a five-percent fee on gross revenues, a ten-fold increase from the 0.5% fee

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[21] There may be a real question as to whether "unfettered discretion," standing alone, is enough to constitute a *per se* effective prohibition within the meaning of Section 253(a). While the Tenth Circuit implies in a footnote that it is, the decision never explains why discretion is inherently prohibitory. The Tenth Circuit relied on a similar phrase used in *Auburn*, but even the *Auburn* court expressly declined to find that discretion, standing alone, was enough to violate Section 253(a). Hence, the precise position of the Tenth Circuit on the discretion issue is unclear. The critical point for this petition is that there is no conflict justifying certiorari, because here there was no "unfettered discretion."

previously imposed. The court adopted the same FCC "materially inhibit" test that has been adopted by the Second, Eighth, Ninth and Tenth Circuits:

> As the [FCC] has explained, "in determining whether an ordinance has the effect of prohibiting the provision of telecommunications services, it 'considers whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'"

Id. at 18 (citations omitted).

Applying this test, the First Circuit examined the record and found that the fee increase "would constitute a substantial increase in costs." *Id.* at 19. Puerto Rico Telephone Company ("PRTC") had provided unrefuted evidence that the fee increase would result in at least an 86% decline in the company's profits. *Id.* at 18. Further, the court found that PRTC would incur additional costs in having to change its accounting and records procedure to track calls originating in the Municipality. *Id.* at 19. Together, the court held that these costs would "place a significant burden on PRTC," which would "'materially inhibit[] or limit[] the ability' of PRTC to 'compete in a fair and balanced legal and regulatory environment.'" *Id.*[22]

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[22] The First Circuit did not decide that it was appropriate to assess the "effect" of other municipalities' requirements under a Section 253(a) challenge to the City of Guayanilla's

As with *Santa Fe,* there is no reason to suppose the First Circuit would find a prohibition where the evidence shows *no* increase in costs, and *no* impact on the company, as here.

No great or widening conflict exists here. Level 3 seems to believe that the Eighth Circuit (and now the Ninth Circuit) uniquely requires a plaintiff to show a requirement has an "effect of prohibiting" while other Circuits find *per se* violations liberally, without regard to the record, and based only on a plaintiff's listing of potential *causes* of such an "effect." That is not the case: Circuit decisions have been properly fact-driven (at least outside the Ninth Circuit), and the Eighth Circuit does not foreclose *per se* effective prohibitions. In this case, nothing in the City's ordinance was *per se* prohibitive, so Level 3 was required to demonstrate that the City's requirements "have the effect of prohibiting the ability of any entity to provide service." It is Level 3's failure to do so – not any novel or conflicting interpretation of law – that dictated the result.

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requirements. Instead, the court held that it was appropriate to consider Puerto Rico-wide information in order to extrapolate the impact in the Municipality of Guayanilla. *Id.* at 17-19 (finding "it is reasonable to conclude that that the effect of Ordinance No. 40 on the profitability of its operations *within the Municipality* would be similarly, or perhaps even more, substantial.") (emphasis added).

III. The Law of Section 253(c) Is Not in Conflict, and Was Not Addressed in the Decision Below.

Level 3's Petition appears to suggest that the Court should also resolve what it characterizes as conflicts in the interpretation of Section 253(c). Pet. 21, 29. No genuine conflict exists over the premise that Section 253(c) serves only as a safe harbor, and not an independent basis for preemption. While it is true that the Sixth Circuit held otherwise in *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000), the courts, including every Circuit that has addressed the issue, have since been nearly uniform in holding that Section 253(c) serves as a safe harbor, to be applied only after finding a preemption under Section 253(a). *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187 (11th Cir. 2001); *TCG N.Y. v. City of White Plains*, 305 F.3d 67, 77 (2d Cir. 2002); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir. 2004); *Puerto Rico Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 16 (1st Cir. 2006); *NextG Networks of NY, Inc. v. City of N.Y.*, 513 F.3d 49, 53 n.4 (2d Cir. 2008); *Sw. Bell Tel. Co. v. City of Houston*, 529 F.3d 257, 262 (5th Cir. 2008).

Nor does any genuine conflict exist on the question of whether fees for use of the rights-of-way must be based on cost. The Ninth Circuit in *Portland* made it clear it had not addressed the issue, 385 F.3d at 1243; the Second Circuit did the same in *White Plains*, 305 F.3d at 78-79. In *Santa Fe*, the district court specifically rejected the "cost"

claim Level 3 makes here. 224 F. Supp. 2d 1305, 1327-28 (D.N.M. 2002). The Tenth Circuit did not require the City to base fees on costs, but found the City's lease fees defective because there was no evidence that they actually reflected the "fair market value" of the property used. 308 F.3d at 1272. The First Circuit in *Guayanilla* recognizes that a majority of courts have rejected the claim that fees must be limited to costs. 450 F.3d at 21. The case refers to basing fees on costs in the context of a record where there was *no* evidence as to the fair market value of the property – leaving cost as a key element for determining whether rates were reasonable. But the fact that the reasonableness of rates may be proven through cost showings does not mean that rates cannot be justified in other ways.

Moreover, because the Eighth Circuit did not interpret or apply Section 253(c) to the challenged Ordinance, there is no need for the Court to do so now. The Eighth Circuit did not find a violation of Section 253(a), and therefore never reached the issue of whether the Section 253(c) safe harbor saves any of the City's requirements from preemption. Pet. App. 33a. The Court ordinarily does not "decide in the first instance issues not decided below." *Nat. Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999). It should not do so in this case.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.[23]

Respectfully submitted,

Kenneth A. Brunetti
Counsel of Record
Joseph Van Eaton
Matthew K. Schettenhelm
Miller & Van Eaton, PLLC
Suite 1000
1155 Connecticut Ave., N.W.
Washington, DC 20036
(202) 785-0600

Stephen J. Kovac
Daniel J. Emerson
314 City Hall
St. Louis, MO 63103
(314) 622- 3361

Counsel for Respondent City of St. Louis, Missouri

December 19, 2008

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[23] The City notes that in a letter to General Suter, dated December 10, 2008, counsel for Sprint Telephony, PCS requested that the Court hold consideration of Level 3's petition in this case until such time as it can be considered with Sprint's petition in another case. The City strongly opposes this request and understands that Level 3 opposes it as well. The City also disagrees that the cases are "materially identical." To the extent there are overlapping issues between the cases, the Court can resolve those issues in one case without having to consider them together.

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IN THE

Supreme Court of the United States

LEVEL 3 COMMUNICATIONS, LLC,

Petitioner,

v.

CITY OF ST. LOUIS, MISSOURI,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

Rex S. Heinke
Michael C. Small
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
2029 Century Park East,
Suite 2400
Los Angeles, CA 90067

Thomas C. Goldstein
Counsel of Record
Anthony T. Pierce
W. Randolph Teslik
Patricia A. Millett
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

WILSON EPES PRINTING CO., INC. — (202) 789-0096 — WASHINGTON, D.C. 20002

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Petitioner Level 3 Communications, Inc. respectfully submits this Supplemental Brief to address the points raised in the *Amicus* Brief of the United States.

* * * *

The petition for certiorari presents the critical and frequently recurring question of the extent to which Section 253 of the Telecommunications Act preempts barriers to entry into local markets. That question is the subject of twin circuit conflicts – one involving Section 253(a) and the other Section 253(c) – that are both widely acknowledged and squarely presented by this case. The Solicitor General's suggestion that certiorari should nonetheless be denied is unsound.

1. The unstated premise underlying the government's brief is the overriding desire of the Federal Communications Commission (FCC) to place the construction of Section 253(a) within its own control and out of the hands of this Court. The government thus argues that the FCC is the correct institution to resolve the conflict over the statute's proper construction. SG Br. 18. It also maintains that the conflict is manageable because – although there is an existing circuit split – the courts of appeals at least *cite* to FCC precedent. SG Br. 16. In reality, this Court's intervention is urgently required because there is no realistic prospect that the FCC will bring clarity to the construction of Section 253 within a reasonable period of time, if at all.

The government does not suggest that the FCC will take any action that would establish greater uniformity with respect to the proper construction of Section 253(a) within the next five years. The FCC interprets the statute through administrative charges instituted by telecommunications providers. *See* 47 U.S.C. § 253(d). But the Commission has never elaborated on the general standard set forth more than a decade ago in *California Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Cal. Pursuant to Sec. 253(d) of the Commc'ns Act of 1934*, 12 F.C.C.R. 14,191 (1997), and it has not decided a single applicable case since that year (*see* SG Br. 11 (citing *Petition of Pittencrieff Commc'ns, Inc. for Declaratory Ruling Regarding Preemption of the Tex. Pub. Util. Regulatory Act of 1995*, 13 F.C.C.R. 1735 (1997))). The government does not indicate that a relevant complaint is even pending at this time, and petitioner is unaware of any. Even once (at some unknown and unknowable date in the future) a telecommunications provider initiates a new complaint before the Commission, it will then still take years to resolve.

The delay suggested by the government would exact too great a cost, and the far more sensible course is for the Court to grant certiorari and for the Solicitor General to present the FCC's views in a merits *amicus* brief. The petition collects the mass of litigation now pending around the nation – all in the courts, none before the FCC – over the application of Section 253, which is subject to tremendous uncertainty. Pet. 32-33 & n.6. The diverse municipal restrictions on telecommunications providers, when combined with the lack of clarity on the proper

interpretation of Section 253, directly inhibit competitive entry into local markets, which depends on providers' access to local rights of way. Pet. 19. The current "patchwork quilt of differing local regulations may well discourage regional or national strategies by telecommunications providers, and thus adversely affect the economics of their competitive strategies." *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21,396, 21,442 (1997). "It becomes extremely difficult for providers to create plans that gaze several years into the future when it is not certain the test by which a municipal ordinance will be examined." AT&T *Amicus* Br. 19.

Because there is no prospect that within a reasonable period of time (if at all) the Commission will "help correct and unify the interpretation and application of Section 253, obviating the need for this Court's intervention" (*contra* SG Br. 9), certiorari should be granted.

2. Certiorari is also warranted because the ruling below is erroneous. Indeed, the most telling feature of the government's brief is that it does *not* endorse the Eighth Circuit's holding that the St. Louis ordinance is not preempted by Section 253.

Chapter 23.64 imposes an array of regulatory constraints that obstruct any competitive telecommunications provider's ability to construct local facilities in St. Louis. The further $140,000 annual charge imposed by the City for petitioner's access to local rights of way is ten times the average per-foot fee paid by petitioner to other local governments, dwarfs all of petitioner's revenues from customers in the City, and would amount to a crushing burden of billions of dollars in yearly fees if

adopted by other municipalities. *See* Cert. Reply 7-8. The Eighth Circuit nonetheless sustained the ordinance without any demonstration that the regulatory scheme does not inhibit competition and that the fee constitutes fair and reasonable compensation for access to local rights of way. *See* 47 U.S.C. § 253(c). This Court should hold that the court of appeals erred and remand for the application of the correct legal standard, including (if necessary) the development of an appropriate record.

The Solicitor General's suggestion (at 13) that the test articulated by the Eighth Circuit is broadly consistent with the FCC's interpretation of the Telecommunications Act addresses only one-half of the inquiry under Section 253(a). The lower courts and the FCC have divided the statute's construction into two separate questions. First, is it sufficient to trigger preemption that a local requirement "may" at some point undermine competition? If not, then second, what present effect by the ordinance is required to trigger preemption?

The FCC agrees with the court of appeals' disposition of the first question: the Eighth Circuit held that a "potential" reduction in competition is insufficient, and the Solicitor General agrees that this "conclusion is consistent with the language of Section 253(a) and with the Commission's decisions applying that provision." SG Br. 10.

But the FCC misapprehends the Eighth Circuit's analysis of the second question, which addresses the present effect of the ordinance that suffices to trigger preemption. The bottom line of the Commission's decision in *California Payphones* is that Section 253(a) preempts local measures that materially

inhibit competition by any provider. As the Solicitor General explains, "a law 'has the "effect of prohibiting" the ability of *any* entity to provide' telecommunications service if it 'materially inhibits or limits the ability of *any* competitor or *potential competitor* to compete in a fair and balanced legal and regulatory environment." SG Br. 2-3 (quoting *California Payphones*, 12 F.C.C.R. at 14,206 ¶ 31) (emphases added). The Solicitor General recognizes that this rule is consistent with this Court's conclusion that Section 253 "prohibits state and local regulation that *impedes* the provision of 'telecommunications service.'" *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 491 (2002) (emphasis added), *quoted in* SG Br. 2.

The Eighth Circuit's standard is materially different and far narrower in its application of federal preemption. The court of appeals did not look broadly to the effect of Chapter 23.64 on competition, but rather much more narrowly inquired whether Level 3 as the provider instituting the suit was itself effectively prohibited from providing a particular service. As the government recognizes, the Eighth Circuit construed the FCC's reference to "an existing material interference with the ability to compete in a fair and balance market" to require petitioner to prove that "the City's ordinance actually or effectively inhibited *Level 3's* ability to provide telecommunications services." SG Br. 13 (quoting Pet. App. 32a) (emphasis added). "In reaching that conclusion, the court *emphasized* Level 3's acknowledgment that *it* could not 'state with specificity what additional services *it* might have provided had it been able to freely use the money

that *it* was forced to pay to the City for access to the public rights-of-way." SG Br. 4 (quoting Pet. App. 32a) (emphases added). That is not a "substantially similar inquiry" to the Commission's standard. *Contra* SG Br. 13.

Indeed, the government recognizes that the court of appeals flatly erred – "accorded inordinate significance," it says – in finding respondent's ordinance not to be preempted because petitioner could not "'state with specificity what additional services it might have provided' if it were not required to pay St. Louis's license fee." SG Br. 13. But the Solicitor General hopes to recharacterize that required showing as something the "court of appeals seems to have regarded as emblematic of broader evidentiary deficiencies in Level 3's case" (SG Br. 13) and thus merely a "shortcoming in its explanation of its decision" (SG Br. 14). In reality, however, the decision on its face reveals that the Eighth Circuit's holding that petitioner "failed to carry that burden" is not a "case-specific determination[]" (*contra* SG Br. 8-9) but rather was the essence of its ruling – *i.e.*, that petitioner could not prevail under Section 253(a) unless it proved that it was effectively excluded from the St. Louis market with respect to some service: "*This admission* establishes that Level 3 has not carried its burden of proof on the record we have before us." Pet. App. 32a (emphasis added).

The Solicitor General notably does not take issue with petitioner's showing (Cert. Reply 3) that the Eighth Circuit's focus on the effect of a local regulatory scheme on the services offered by the particular provider that happened to bring suit cannot be reconciled with either the text of Section

253(a) or the purpose animating its enactment. The statute provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any* entity to provide *any* interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Congress moreover enacted Section 253(a) to uproot local monopolies. *See* Pet. 15. But the Eighth Circuit's interpretation of the statute is largely unconcerned with the challenged measure's overall anti-competitive effect and turns on the coincidence of the provider that happens to file suit.

For essentially the same reason, the First, Second, and Tenth Circuits are correct in their separate holding that Section 253(a) calls for an inquiry into whether a challenged local regulation has the potential to block competitive entry, even if it has yet to do so in practice. *Contra* SG Br. 10. Necessarily, the most appropriate gauge of whether a restriction undermines competition by a "*potential* competitor" (*California Payphones*, 12 F.C.C.R. at 14,206 ¶ 31 (emphasis added)) is whether it threatens to interfere with such a provider's entry into the market in the future.

Equally problematic, the court of appeals' ruling erects an essentially insuperable barrier to a claim that a local right-of-way fee is preempted under Section 253(a). Telecommunications providers pay such charges – however exorbitant – from ordinary corporate funds. As a practical matter, given the fungibility of money, there is no way for a provider such as Level 3 to trace those expenditures back to a particular service that it fails to provide in that

specific locality. In this case, for example, the $140,000 annual fee charged by St. Louis is unquestionably significant, and petitioner alleges that it will inhibit market entry by competitive telecommunications providers. But the court of appeals sustained the ordinance without inquiring into its anti-competitive effects because Level 3 failed to satisfy the impossible burden of proving that it would have offered some additional service in St. Louis if it had not been required to pay that specific fee.

The ruling below equally fails to account for the nature of providers' sunk investments into modern telecommunication infrastructure. Once Level 3 has physically constructed a network in a City such as St. Louis, the marginal costs of providing additional services to customers through that existing network are relatively small, because those services are heavily based on virtual computer code rather than the construction of expensive new physical facilities. The provider's principal costs thus lie in the initial construction of the network. Hence, the massive fees that St. Louis imposes can easily inhibit competitive entry without an existing provider such as Level 3 having any ready means of identifying services that it is effectively precluded from providing.

The court of appeals' error is highlighted by Section 253(c), in which Congress authorized local governments "to manage the public rights-of-way [and] to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis." In this case, St. Louis made no attempt to assess its own costs – which could provide a basis for setting a

"fair and reasonable" fee – but instead is avowedly extracting monopoly rents for access to local rights-of-way. BIO 7, 21 n.14.

Nor does the Solicitor General doubt petitioner's showing that the St. Louis scheme contravenes Section 253(c) because it discriminates against competitive providers such as Level 3 and in favor of incumbents. In contrast to the fees that petitioner pays, which far exceed the income it generates from customers in the city, the incumbent is required to pay only ten percent of its local revenues. *See* Pet. 7; Cert. Reply 12.

3. Certiorari is also warranted because, like both the Eighth and Ninth Circuits (Pet. App. 27a-28a; *Sprint Telephony PCS, LP v. County of San Diego*, 543 F.3d 571, 577 (9th Cir. 2008)), the Solicitor General acknowledges the circuit conflict over the proper construction of Section 253(a). "The Eighth and Ninth Circuits correctly recognized that their view of the Section 253(a) preemption standard differs in some respects from that of the First, Second, and Tenth Circuits." S.G. Br. 15. That is the point of the Solicitor General's back-handed acknowledgment that, notwithstanding that they cite to the FCC's *California Payphones*, the latter "circuits have interpreted the Commission's standard through the lens of *Auburn*'s more-preemptive 'may' standard—contrary to the approach of the Eighth and Ninth Circuits' decisions here." SG Br. 9. In other words, the courts of appeals may cite the same FCC standard, but they interpret and apply it differently.

The "Second and Tenth Circuits" thus did not merely "*suggest* that Section 253(a) *can* preempt local

ordinances that grant municipal officials discretion to forestall or deny applications for required permits or franchises, even in the absence of any evidence that the officials have exercised their discretion in a manner that has harmed competitive entry." *Contra* SG Br. 16 (emphases added). To the contrary, that is the precise *holding* of those courts. As the government acknowledges, "the First, Second, and Tenth Circuits have applied the 'materially inhibits' standard" to hold that "a legal requirement was subject to preemption if it *might* have had the effect of prohibiting the ability of an entity to provide telecommunications services." SG Br. 16 (emphasis added). As detailed in the petition, the St. Louis ordinance in this case has all the features that the First, Second, and Tenth Circuits have invoked to find preemption under Section 253. Pet. 28-29.

The Solicitor General says that "it is significant that [in the cases giving rise to the circuit conflict], the providers bringing suit had made initial attempts to invoke the localities' permitting process, rather than challenging the ordinances on their face." SG Br. 17. But that is of course equally true in this case, in which petitioner challenged the application of Chapter 23.64 to it.

This Court's intervention is also warranted to resolve the acknowledged conflict between the ruling below and *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000). Pet. App. 28a. Although the Sixth Circuit in *TCG Detroit* "ultimately concluded that Section 253(c) did not preempt the challenged law," the Sixth Circuit's decision was not in any respect "dicta." *Contra* SG Br. 19. The court of appeals considered "whether the fee assessed by the

City is 'fair and reasonable compensation'" under Section 253(c) only after specifically holding (i) that Section 253(c) "does confer" a separate private right of action, (ii) that "[a] violation of § 253(c) might well not involve violating § 253(a)" and (iii) that the provider's distinct claim under Section 253(a) was "sophistry." 206 F.3d at 624-25.

4. The Solicitor General finally contends that "there does not appear to be a fully developed record on the effect of St. Louis's ordinance" and that "key facts relevant to Level 3's preemption claims appear to be in dispute." SG Br. 20. But the government argues at cross-purposes with itself in asserting simultaneously that this Court should avoid "case-specific determinations" regarding the application of Section 253 but nonetheless await "a case with a better-developed factual record." SG Br. 9. In fact, the petition presents a pure question of law regarding the appropriate standard for determining whether a local ordinance is preempted under Section 253. The parties assembled a thorough record regarding the ordinance's effect on petitioner. That record thus establishes that the fees charged by St. Louis under Chapter 23.64 far exceed petitioner's revenues from the City and that the fees divert funds that petitioner would otherwise devote to the development of new telecommunications services. Cert. Reply 6-7.

To the extent that there is any gap in the record regarding the anti-competitive effect of the St. Louis ordinance, it arises entirely from the fact that the Eighth Circuit's legal standard turns on whether Level 3 itself was effectively prohibited from providing a specifically identified service. Petitioner was erroneously forbidden from developing a broader

record. Pet. App. 5a-8a, 15a-20a. Importantly, given the narrow focus of the legal rule adopted below and the standards applied by other circuits, there is no reason to anticipate that a later case will have a more fully developed record regarding the general anticompetitive effect of such ordinances. None of the cases giving rise to the circuit conflict appear to have explored that factual question. The appropriate course – common in this Court's precedents – is accordingly for this Court to articulate the correct legal standard and then remand the case for the application of that standard in light of whatever factual record is appropriate.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

Rex S. Heinke
Michael C. Small
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067

Thomas C. Goldstein
Counsel of Record
Anthony T. Pierce
W. Randolph Teslik
Patricia A. Millett
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

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No. 08-626

IN THE

Supreme Court of the United States

LEVEL 3 COMMUNICATIONS, LLC,

Petitioner,

v.

CITY OF ST. LOUIS, MISSOURI,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

Rex S. Heinke
Michael C. Small
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
2029 Century Park East,
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

Thomas C. Goldstein
Counsel of Record
Anthony T. Pierce
W. Randolph Teslik
Patricia A. Millett
Tobias E. Zimmerman
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

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REPLY BRIEF FOR THE PETITIONER

The Telecommunications Act of 1996 provides that no state or local regulation "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" (47 U.S.C. § 253(a)), reserving the authority "to manage the public rights-of-way [and] to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis" (*id.* § 253(c)).

Respondent City of St. Louis argues that this Court's review of the Eighth Circuit's construction of Section 253 is unwarranted because the record supposedly shows, and the Eighth Circuit supposedly held, that the City's ordinance had no adverse effect on petitioner; therefore, respondent asserts, its ordinance would not be preempted under any of the circuits' competing interpretations of Section 253. Respondent's argument rests on a substantial misstatement of both the record and the Eighth Circuit's decision. The exorbitant fees that St. Louis charges petitioner and other providers for access to that market inhibits competition by deterring entry and by trading off against the funds available to develop new services. But because money is fungible, those fees do not necessary limit particular service offerings in the city. The court of appeals accordingly sustained the ordinance not on the false premise that it had no effect on petitioner, but rather because the court avowedly read Section 253 narrowly to require petitioner to make a very particular showing: that Level 3 was unable to provide particular services in St. Louis as a result of the ordinance.

The Eighth Circuit had no justification for departing from this Court's correct understanding that Section 253 preempts any measure that "impedes the provision of telecommunications services" (*Verizon Commc'ns., Inc. v. FCC*, 535 U.S. 467, 491 (2002)) or "interfere[s] with the delivery of telecommunications services" (*Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004)). Like other circuits, which properly reject the Eighth Circuit's stringent standard of proof, the court of appeals should have held that an unreasonably large licensing fee like St. Louis's necessarily inhibits competition and triggers preemption under Section 253. Certiorari is warranted to correct that error and the circuit conflicts it spawned.[1]

I. THE EIGHTH CIRCUIT'S DECISION SERIOUSLY MISREADS SECTION 253.

As the petition demonstrated, the Eighth Circuit's decision suffers from at least two significant flaws.

First, the ruling below erroneously places determinative weight on the ordinance's effect on the services provided within that locality by the

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[1] This case also presents the best vehicle for resolving the twin circuit conflicts over the meaning of Sections 253(a) and (c). The telecommunications provider in No. 08-759, *Sprint Telephony PCS, L.P. v. San Diego, Cal.*, has requested that the Court not grant certiorari in this case and hear argument this Term, so that the *Sprint* petition can be consolidated with this one. For the reasons set forth in petitioner's *amicus* brief in No. 08-759 (which is reproduced as an Appendix to this reply, *infra*), that suggestion is not well founded.

particular telecommunications provider that happened to bring suit. Section 253(a) measures preemption by the burden of a municipal ordinance on "the ability of *any* entity to provide *any* interstate or intrastate telecommunications service," with no geographic restriction (emphases added). By definition, an "interstate" service is not offered in one particular locale. Congress recognized that public rights-of-way are not only an essential component of service to local markets but also constitute a significant bottleneck to *nationwide* communications across backbone networks traversing innumerable municipalities. The statute thus looks broadly to whether the local ordinance is of a type that inhibits the delivery of telecommunications services generally.

The court of appeals' holding that the City's ordinance is not preempted because petitioner elected to provide services in St. Louis misreads Section 253. The fact that petitioner – an international telecommunications provider which had already entered the market – did not limit its services or withdraw from the market is not determinative of the preemption inquiry. Indeed, Congress could not have intended the validity of the ordinance to turn on the coincidence of whether the plaintiff telecommunications provider happens to be small enough or so financially fragile that the municipality's fee renders it peculiarly unable to serve that market.

The court of appeals' holding is further flawed because it affords no weight to the fact that the ordinance significantly inhibits competition not only by deterring entry by other, smaller would-be

entrants, but also by diverting to the City funds that petitioner and other providers would otherwise use to develop and deploy additional services around the country. It furthermore fails to apply the proper "broader frame of reference" that "ask[s] how Congress could have envisioned the preemption clause [of Section 253] actually working" (*Nixon*, 541 U.S. at 133) if municipalities nationwide adopted the authority claimed by St. Louis and awarded by the Eighth Circuit to impose burdensome licensing requirements and exact exorbitant fees. Accepting that logical consequence of the court of appeals' ruling, the many billions of dollars in fees that would be charged to petitioner and other competitive providers would have a crushing effect on the delivery of telecommunications services.

Second, Congress specified the measure for determining whether fees sufficiently inhibit competition to trigger preemption in Section 253(c), which gives local governments limited authority to adopt fees that exact "fair and reasonable compensation" on a "competitively neutral and nondiscriminatory basis." Congress' determination in Section 253(c) to constrain the range of permissible right-of-way fees to those that are "fair and reasonable" necessarily rests on its conclusion that, left to their own devices, local governments would impose barriers to entry (including monopolistic fees) and thereby inhibit entry by competing telecommunications providers. *See* Pet. 16-17 n.1; *cf.* BIO 15 (embracing the view that "Section 253(a), as adopted, was primarily concerned with uprooting regulatory systems that granted telephone monopolies").

Indeed, respondent seemingly recognizes that its position rests on the claim that the only constraint on its power to set right-of-way fees is that imposed by "free markets" (BIO 24), such that it has the same power to set rents as any other landlord (*id.* at 24 n.16). On that reading, Section 253 allows the City to charge whatever fee reflects "the valuable right to place [a provider's] fiber optic cable and related facilities in the City's rights-of-way" (*id.* at 7) in light of the high "value of the real estate in St. Louis" (*id.* at 21 n.14). But public rights-of-way are dramatically different from the open market for housing: municipalities, by definition, hold a monopoly over the rights-of-way that must be traversed to construct a telecommunications network. Consequently, respondent's position is that it can charge monopoly rents without regard to their adverse effect on competition, as St. Louis has done with the bottleneck facility over which it has exclusive control. But that is precisely what Section 253 forbids.

By embracing the City's position, the Eighth Circuit's decision all but reads Section 253(c) out of the statute. The structure of the Act – in which Section 253(c) is an exception to the prohibition of Section 253(a) – necessarily implies that Congress intended the latter to have a broader preemptive sweep. But on the court of appeals' narrow reading of Section 253(a), it is hard to imagine a fee that is simultaneously so large that it precludes particular local services in violation of Section 253(a) but so small that it is saved as "fair and reasonable compensation" under Section 253(c). Put another way, the Eighth Circuit's decision implausibly

authorizes municipalities to enact *un*fair and *un*reasonable fees, so long as those fees cannot be traced to the plaintiff's decision to withdraw specific services from that jurisdiction.

The Eighth Circuit's ruling equally reads Section 253(c) out of the statute by affording no weight to the fact that, by imposing a substantially less onerous and expensive legal regime on the incumbent telecommunications provider, the ordinance impermissibly "discriminat[es]" (Section 253(c)) against new entrants to the St. Louis market. *See* Pet. 4, 9, 15, 20. Similarly, in several respects – such as the limitation on the types of services Level 3 may provide – the ordinance regulates telecommunications directly, not merely "the public rights-of-way." *See id.* at 22-23.

II. THERE IS NO MERIT TO THE CITY'S CLAIM THAT ITS ORDINANCE HAS "NO EFFECT" ON PETITIONER.

Certiorari is also warranted because this case presents an ideal vehicle in which to address the proper construction of Section 253. The record demonstrates that:

- petitioner pays roughly $140,000 in annual licensing fees just for access to public rights-of-way in St. Louis, nearly double Level 3's total annual revenue from all of its local customers in the City (Pet. 7 (citing C.A. J.A. 425-47))[2];

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[2] That figure does not, as the City assumes without explanation, "exclude[] revenues where a call or service may originate in St. Louis and terminate elsewhere, or vice versa."

- if other local jurisdictions adopted the same fee structure, petitioner would be forced to pay well over a *billion* dollars in additional costs (*see id.* at 19); and
- the fees that petitioner pays the City would otherwise be used to develop additional services, which petitioner would use to compete against other providers (*see id.* at 16 (citing C.A. J.A. 423, 433)).

Furthermore, given that respondent does not contend that its fees bear "*any* relation" to its costs (Pet. App. 54a (emphasis added)), there is no serious argument that those fees represent permissible "compensation" for any service provided by the City. Nor are the fees "fair and reasonable." Respondent's assertion that its fees are "less than what Level 3 pays in other jurisdictions" (BIO 32) is substantially misleading: while a small minority of jurisdictions impose similarly massive fees (which petitioner believes are preempted as well), there are also a substantial number of jurisdictions that charge less – or nothing – for use of the public rights-of-way. *See, e.g.*, R.S. Mo. § 67.1840.2(1) (fees limited to "actual, substantiated costs); Cincinnati Mun. Code ch. 405 (no fee). St. Louis's fee of approximately $2.00 per foot is more than *ten times* the average fee that Level 3 pays for access to rights-of-way on its network. *See*

Contra BIO 8. The multi-million dollar figure of petitioner's "revenues attributed to the St. Louis market" cited by the City (BIO 7) is grossly inflated because it represents an estimate of the total revenue from a portion of *all* telecommunications that traverse the St. Louis segment of petitioner's network while traveling across the country. *See* C.A. J.A. 425-26, 768-69.

Level 3 Communications, Annual Report (Form 10-K), at F-88 (Feb. 29, 2008).

The City's contention that this case nonetheless is a poor vehicle to resolve the correct interpretation of Section 253 because petitioner failed to prove that the ordinance has any material adverse effect on it misstates both the record in this case and the legal conclusion that the Eighth Circuit drew from it. The court of appeals held that Section 253 preempts only local regulations that cause petitioner not to provide specific services in that local market. Pet. App. 11a, 13a. Petitioner candidly acknowledged that "it cannot be determined what services Level 3 might have provided or developed using the money that was otherwise paid to St. Louis." BIO 8 (quoting C.A. J.A. 384). On that basis, the court of appeals found dispositive that petitioner "cannot state with specificity what additional services it might have provided had it been able to freely use the money that it was forced to pay to the City for access to the public rights-of-way." Pet. App. 32a.

Contrary to the City's supported assertions, however, petitioner manifestly did *not* concede more broadly "that the ordinance had no impact" (BIO 22 n.15) and, in turn, the Eighth Circuit did not rest its decision on a non-existent "admission that the company could not identify any impact" (*id.* at 22-23). Rather, the record shows (and the court of appeals did not doubt) that the City's burdensome regime adversely affects competition (*see supra* at 6-7), but not in a fashion that is susceptible of identifying particular services that petitioner withdrew from the St. Louis market.

This Court's intervention is essential because the Eighth Circuit's exacting standard, if left in place, would effectively ensure that licensing fees like those imposed by St. Louis are upheld and that Section 253 is rendered a nullity. A fee for access to public rights-of-way generally will not cause a telecommunications provider to withhold service from a particular customer or to withdraw a particular service. The roughly $140,000 fee that the City requires petitioner to pay for access to public rights-of-way is a fixed cost for securing access to the city as a whole. It does not vary materially based on the number of subscribers petitioner has in St. Louis. The fee's effects on competition are not limited to rendering it uneconomical for petitioner to offer services to identifiable customers in the City. Rather, the burden of the fee undermines competition by reducing a provider's incentive to offer competitive services in St. Louis *at all* and by diverting funds that would otherwise be devoted to efforts at innovation.

III. THE EIGHTH CIRCUIT CORRECTLY RECOGNIZED THAT ITS RULING GIVES RISE TO TWO CONFLICTS IN THE CIRCUITS.

This Court's review of the Eighth Circuit's erroneous construction of Section 253 is all the more warranted because, as the court of appeals expressly acknowledged, its ruling gives rise to two separate circuit conflicts. Pet. App. 30a, 34a; *see also Sprint Telephony PCS, L.P. v. County of San Deigo*, 542 F.3d 571, 577 (9th Cir. 2008) (en banc). As explained by the *amicus* brief in support of the petition

> The circuit split described in the petition has material repercussions for providers with nationwide networks, like AT&T, which face conflicting Section 253 standards across the country. . . . To mitigate such disincentives for technological advancement, the Court should establish a uniform standard for Section 253.

AT&T *Amicus* Br. 18-19. *See also* Pet. 30-31 (demonstrating that national uniformity is essential).

Respondent principally contends that no circuit finds "a violation of Section 253(a) in the face of evidence that the challenged ordinance had no material 'effect' on the plaintiffs." BIO 28-29. But that argument rests on the misstatement of the record discussed above. Of note, despite all of the City's rhetoric, none of the decisions giving rise to a circuit conflict rests in *any* respect on a finding that the plaintiff telecommunications provider failed to provide *any* particular service in the defendant municipality. Rather, the ordinances in those cases, like this one, exacted substantial fees, did not mandate that the local government grant licenses, or discriminated in favor of the incumbent service provider. *See* Pet. 24-27.

Respondent's alternative argument is that the circuits apply a uniform rule because every court of appeals has "relied on the FCC's test" that Section 253 preempts local regulations that have a "material" effect on competition. BIO 29. But while several courts of appeals cite that formulation at a *very* high level of generality, the Eighth Circuit correctly recognized that they nonetheless interpret it very differently, applying a substantially more lenient standard for finding that the costs imposed by a

licensing regime give rise to preemption under Section 253. *See Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004) ("substantial cost"); *TCG NY, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) (fee greater than that imposed on incumbent service provider); *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (fees, if adopted by other jurisdictions served by the provider, would "significantly increase [the provider's] costs and reduce the profitability of its operations"). The fee invalidated in *Guayanilla*, for example, was five percent of the provider's revenues (450 F.3d at 12 & n.3), which is *trivial* compared to St. Louis's exorbitant charge. *See supra* at 6-7.

Further, unlike the Eighth Circuit, other courts of appeals account for the effect of the challenged ordinance beyond the mere ability of the specific plaintiff telecommunications provider to supply services in that particular jurisdiction. For example, the Second and Tenth Circuits have held that Section 253 preempts provisions that grant a municipality the discretion not to issue a license, even when that discretion is not exercised. *See White Plains*, 305 F.3d at 76; *Santa Fe*, 380 F.3d at 1270. The City avers that it has never "chosen not to execute a license" that has been authorized by the City's Board of Public Service. BIO 4. But the same was true in *White Plains* and *Santa Fe*. Respondent's further assertion that "the district court found it did not" have "unfettered discretion" in licensing (*id.* at 20), is incorrect: the court only discussed an entirely separate provision governing the submission of licensing information (*see* Pet. App. 57a-58a

(discussing Ch. 23.64.050(B)); and respondent notably does *not* deny that it retains the discretion to deny a license even when the Board approves it. *See* Ch. 23.64.050(C) (City is merely "empower[ed]" to issue a license); Pet. 6.

Finally, the City ignores the conflict created by the Eighth Circuit's ruling that St. Louis's ordinance is not preempted notwithstanding that it discriminates in favor of the incumbent and against competitive providers such as petitioner. Thus, in *White Plains*, the Second Circuit invalidated a license fee that discriminated in favor of the incumbent provider. 305 F.3d at 79-80. The Second Circuit would necessarily invalidate St. Louis's ordinance, given that incumbents there not only are subject to a far less onerous regulatory regime, but pay a fee of only 10% of revenues, in contrast to the nearly 200% fee paid by petitioner. *See* Pet. at 7.

Because the Eighth Circuit's decision misconstrues an essential provision of the Telecommunications Act in conflict with decisions of other circuits, certiorari should be granted.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Rex S. Heinke
Michael C. Small
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
2029 Century Park East,
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

December 2008

Thomas C. Goldstein
Counsel of Record
Anthony T. Pierce
W. Randolph Teslik
Patricia A. Millett
Tobias E. Zimmerman
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

APPENDIX

No. 08-759

IN THE

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v.

SAN DIEGO COUNTY, CALIFORNIA, ET AL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
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BRIEF *AMICUS CURIAE* OF LEVEL 3 COMMUNICATIONS, LLC, IN SUPPORT OF NEITHER PARTY

Rex S. Heinke
Michael C. Small
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
2029 Century Park East,
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

Thomas C. Goldstein
Counsel of Record
Anthony T. Pierce
W. Randolph Teslik
Patricia A. Millett
Tobias E. Zimmerman
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

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INTEREST OF AMICUS CURIAE

Amicus curiae Level 3 Communications, LLC, is the petitioner in a pending petition for certiorari (No. 08-626, *Level 3 Communications, LLC v. City of St. Louis, Mo.*) discussed in the petition for certiorari in this case.

BRIEF *AMICUS CURIAE* OF LEVEL 3 COMMUNICATIONS, LLC[1]

Amicus is the petitioner in No. 08-626, *Level 3 Communications, LLC v. City of St. Louis, Mo.* (hereinafter, *Level 3*). *Amicus* agrees with the petitioner in this case that the decision of the Ninth Circuit (like the decision of the Eighth Circuit that it expressly adopts) directly implicated an important and recurring circuit conflict and seriously misreads the Telecommunications Act of 1996. Those decisions cannot be reconciled with the plain text of the statute or the pro-competitive purpose underlying its enactment. Nor, as petitioner Sprint explains (at 19-20), do those rulings draw any support from the

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[1] Pursuant to Rule 37.2, all parties have consented to the filings of this brief, and letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

position of the Federal Communications Commission.[2]

Amicus nonetheless disagrees with the contentions of petitioner Sprint that its petition (hereinafter, *Sprint*) presents a better vehicle than *Level 3* to resolve the recurring conflicts in the circuits over the proper construction of Section 253 of the Telecommunications Act of 1996, or alternatively that the cases should both be granted and consolidated for briefing and argument. *See Sprint* Pet. at 26-28, For six reasons, it would be unwise for the Court to grant certiorari in this case rather than *Level 3*. Nor should the Court consolidate the two together.

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[2] Indeed, in *Level 3*, respondent City of St. Louis acknowledges that the standard applied by the Ninth Circuit prior to its recent en banc ruling in *Sprint* – which broadly applied Section 253 to find preemption – "has been used by the FCC and other courts." *Level 3* BIO 26. St. Louis nonetheless argues that the FCC supports the City's position in light of "suggested guidelines" in which the FCC requests information on the "specific telecommunications service or services . . . the petitioner [is] prohibited or effectively prohibited from providing." *Id.* at 18 (quoting 13 F.C.C.R. 22970 (1998)). But that request for information is not equivalent to a legal standard for proving preemption. St. Louis also omits the FCC's caution that "not all questions will be relevant to all petitions" (13 F.C.C.R. 22971), as well as its directive that parties submit information on factors that the Eighth and Ninth Circuits would deem irrelevant, such as "whether price levels in the market preclude recovery of any such additional costs" and "cumulative adverse effects of requirements flowing from multiple local regulatory regimes" across the country (*id.* at 22972).

First, only *Level 3* presents the Court with the opportunity to resolve the conflict with the Sixth Circuit's holding in *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000), that Section 253(c) provides an independent basis for finding preemption under the Telecommunications Act, without regard to whether the challenged ordinance runs afoul of Section 253(a). The Eighth Circuit squarely acknowledged that conflict and, in response to Level 3's argument, passed upon the issue. No. 08-626 Pet. App. 28a.[3]

Second, and relatedly, the proper construction of Section 253(a) cannot be understood without reference to the exception provided by Section 253(c). *See Level 3* Pet. for Cert. 20-21; *Level 3* Cert. Reply 4-6. Thus, a significant argument of telecommunications providers in support of preemption under Section 253 is that the proper measure of whether a fee effectively prohibits a telecommunications service is whether it is "fair and reasonable" within the meaning of Section 253(c). Because Sprint has avowedly abandoned all reliance on Section 253(c) (*see Sprint* Pet. for Cert. 28 n.10), granting only its petition threatens to either distort or leave unresolved the preemptive effect of Section 253. In an analogous circumstance, the Court

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[3] In its brief in opposition in *Level 3*, St. Louis asserts that the Eighth Circuit "did not interpret or apply Section 253(c)." *Level 3* BIO 12. In fact, as the City elsewhere recognizes, the court of appeals squarely "ruled that Section 253(c) does not independently limit local government action." *Id.* at 11 (citing Pet. App. 28a-29a). That ruling directly responded to petitioner's submissions. *See Level 3* Pet. App. 28a.

recently granted certiorari in No. 08-108, *Flores-Figueroa v. United States*. Although the Solicitor General had acquiesced to certiorari in an earlier-filed petition presenting the same question (No. 08-5316, *Mendoza-Gonzales v. United States*), the petitioner in *Flores-Figueroa* presented a more complete set of arguments in support of the defendants' construction of the statute at issue in that case. *See Flores-Figueroa* Cert. Reply 2-4.

Third, the *Level 3* petition more directly presents the circuit conflict over the proper construction of Section 253(a). The decisions of other circuits affording broad preemptive effect to Section 253 all involve local regulations governing telecommunications providers' access to public rights-of-way. *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004); *TCG NY, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002). That is the factual context in which the *Level 3* petition arises, and that petition accordingly presents the Court with the benefits that come from the percolation in the lower courts of the question of when such measures violate Section 253. The *Level 3* petition (at 32-33 & n.6) also collects the significant array of similar litigation that is pending in the lower courts.

Sprint, by contrast, involves the rules governing the siting of wireless telecommunications equipment, a distinct factual context that has not been the subject of conflicting appellate rulings or equivalent percolation. Importantly, *Sprint* does not present the recurring question, on which the courts of appeals are divided, of the scope of a local government's authority

to charge licensing fees for access to public rights-of-way.

Fourth, *Sprint* presents a potentially significant complication that could prevent this Court from resolving the proper construction of Section 253. A separate provision of the Telecommunications Act, Section 332(c)(7), directly governs "local zoning authority" over "[m]obile services" and provides that a local regulation "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." The respondent county in *Sprint* contends that the case is properly resolved under Section 332(c)(7), not Section 253. Although there is certainly overlap between the provisions, the former is limited to competition in "personal wireless services." Section 332(c)(7) moreover contains no equivalent to Section 253(c)'s restriction of local regulation to "fair and reasonable compensation." Further, Section 332(c)(7) contains its own distinct set of procedural requirements. *See City of Rancho Palo Verdes v. Abrams*, 544 U.S. 113 (2005).

Fifth, *Sprint* also is an inappropriate vehicle in which to resolve the proper construction of Section 253 because the case was framed in the Ninth Circuit as a "facial challenge" to San Diego's regulatory scheme. As a consequence, *Sprint* presents the unusual overlay – raised in few if any other cases involving Section 253 – of the proper role of "the rule of *United States* v. *Salerno*, 481 U.S. 739 (1987), under which a claimant must show that 'no set of circumstances exists under which the [challenged statute] would be valid.'" *Sprint* Pet. for Cert. 11 (alteration in original). The respondent city in *Sprint* is thus sure to argue that the Court need not resolve

the proper construction of Section 253 in that case because its regulatory scheme can at the least be lawfully applied in appropriate circumstances.

Sixth, and more broadly, *Sprint* is a poor vehicle for resolving the scope of Section 253, because there is no record in that case of how the challenged wireless regulation functions in practice. Rather, Sprint challenged the regulation soon after it went into effect. *See Sprint* Pet. App. 4a. The petitioner in *Level 3*, by contrast, operated for several years under the St. Louis regulatory scheme.

The remaining question is whether certiorari should be granted in both *Level 3* and *Sprint* and the two consolidated for briefing and argument. As the example of the *Flores-Figueroa* and *Mendoza-Gonzales* petitions illustrates, *see supra* at 3-4, this Court's general practice is not to grant review in multiple cases presenting the same question. Sprint presents no substantial basis for departing from that practice here. If certiorari is granted in *Level 3*, Sprint no doubt will file an *amicus* brief on the merits, which could bring to the Court's attention any special considerations relating to wireless telecommunications services.

There would moreover be a material cost to adopting Sprint's proposal to hear the cases together. The parties in *Level 3* coordinated the briefing schedule in that case to present this Court with the opportunity, if it granted certiorari, to decide the case this Term. Level 3 thus filed its petition early and the City of St. Louis took only an abbreviated extension of time to respond. The case accordingly is scheduled to be considered at the Court's Conference of January 16, 2009, which is likely to be the last

opportunity for cases to be set for argument this Term.

By contrast, in *Sprint*, the petitioner took all of its available time before filing its petition, and the respondent has taken a thirty-day extension of time to respond. As is illustrated by No. 08-645, *Abbott v. Abbot*, Sprint could have filed its petition as late as mid-November and still guaranteed that its case was available for Conference in mid-January. But it elected not to do so. *Sprint* accordingly will likely not be set for Conference until March 20, 2009. If the two petitions were granted on that date, the cases likely would not be argued until November 2009 and not decided until the Spring of 2010. Sprint's suggestion thus invites nearly a year of additional delay.

It would be inadvisable to so significantly defer resolving this important question. Both Level 3 and Sprint agree that the issue is of surpassing interest to the telecommunications industry. The current uncertainty over the scope of permissible local regulation "necessitates *immediate* intervention." *Sprint* Pet. for Cert. 23 (emphasis added). Local governments have a similarly significant interest in finally securing certainty regarding the scope of their regulatory authority. That is no doubt why St. Louis opposes Sprint's request as well. *See Level 3* BIO 37 n.23. Indeed, as the *Level 3* petition demonstrates (at 32 n.6), there is a wide array of litigation over the proper scope of Section 253 now pending in the district courts. The efficient disposition of those cases would be materially advanced by a prompt ruling by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari in No. 08-626, *Level 3 Communications, LLC v. City of St. Louis, MO.* The Court should hold the petition in this case and dispose of it as appropriate in light of its decision in *Level 3.*

Respectfully submitted,

Rex S. Heinke
Michael C. Small
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067
(310) 229-1000

Thomas C. Goldstein
Counsel of Record
Anthony T. Pierce
W. Randolph Teslik
Patricia A. Millett
Tobias E. Zimmerman
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

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Nos. 08-626 and 08-759

In the Supreme Court of the United States

LEVEL 3 COMMUNICATIONS, LLC, PETITIONER

v.

CITY OF ST. LOUIS, MISSOURI

SPRINT TELEPHONY PCS, L.P., PETITIONER

v.

SAN DIEGO COUNTY, CALIFORNIA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELENA KAGAN
Solicitor General
Counsel of Record

P. MICHELE ELLISON
Acting General Counsel

JOSEPH R. PALMORE
Deputy General Counsel

RICHARD K. WELCH
Deputy Associate General Counsel

MALCOLM L. STEWART
Deputy Solicitor General

NANDAN M. JOSHI
Counsel
Federal Communications Commission
Washington, D.C. 20554

ERIC D. MILLER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 47 U.S.C. 253(a), which provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," preempts only those state and local requirements that have an actual effect on the ability to provide service, as opposed to those that might have such an effect in the future.

2. Whether 47 U.S.C. 253(c), which provides that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation * * * for use of public rights-of-way," preempts regulations not otherwise preempted by 47 U.S.C. 253(a).

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In the Supreme Court of the United States

No. 08-626

LEVEL 3 COMMUNICATIONS, LLC, PETITIONER

v.

CITY OF ST. LOUIS, MISSOURI

No. 08-759

SPRINT TELEPHONY PCS, L.P., PETITIONER

v.

SAN DIEGO COUNTY, CALIFORNIA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States in these cases. In the view of the United States, both of the petitions for writs of certiorari should be denied.

STATEMENT

1. Before 1996, "States typically granted an exclusive franchise in each local service area to a local exchange carrier" to provide local telephone service.

AT&T v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Congress eliminated those monopoly franchises by enacting 47 U.S.C. 253, which "prohibits state and local regulation that impedes the provision of 'telecommunications service.'" *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 491 (2002) (citation omitted). Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a). Section 253(c) creates a safe harbor from that basic prohibition by providing that Section 253 does not "affect[] the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way." 47 U.S.C. 253(c).

Under 47 U.S.C. 253(d), the Federal Communications Commission (FCC or Commission) is authorized to "preempt the enforcement of" any state or local "statute, regulation, or legal requirement" that it determines violates Section 253(a). The Commission has concluded that a law "prohibits" an entity from providing telecommunications service if it imposes "an express legal prohibition of service covering all of the relevant geographic market." *California Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Cal. Pursuant to Sec. 253(d) of the Commc'ns Act of 1934*, 12 F.C.C.R. 14,191, 14,205 ¶ 30 (1997) (*California Payphone Order*). The Commission has concluded that a law "has the 'effect of prohibiting' the ability of any entity to provide" telecommunications

service if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 14,206 ¶ 31.

2. *No. 08-626.* a. This case concerns a St. Louis ordinance that requires telecommunications providers using public rights-of-way to obtain licenses from the city and to comply with various municipal requirements. 08-626 Pet. App. 24a-25a. The city also imposes an annual license fee, which is calculated on the basis of the "number of linear feet of conduit installed" and the "number of active conduits within each linear-foot." *Id.* at 25a.

In April 1999, petitioner Level 3 Communications (Level 3) entered into a license agreement with St. Louis. 08-626 Pet. App. 24a. After disputes arose regarding the validity of the license fee and various non-fee requirements, each party brought suit against the other in the United States District Court for the Eastern District of Missouri. *Id.* at 25a. On cross-motions for summary judgment, the district court concluded that the ordinance "includes several provisions that in combination have the effect of prohibiting the ability to provide telecommunications services under 47 U.S.C. § 253(a)." *Id.* at 49a (quotation marks omitted). The court held that the city's license fee was not saved by the Section 253(c) safe harbor because the city had not shown that the fees "have any relation to the City's costs in managing, inspecting, and maintaining its rights-of-way," and so had failed to meet its burden of proving that the fees were "fair and reasonable." *Id.* at 54a. The court upheld the ordinance's non-fee provisions, however, as reasonable management requirements for rights-of-way under Section 253(c). *Id.* at 56a-70a.

b. The Eighth Circuit reversed. 08-626 Pet. App. 23a-35a. The court observed that Section 253(a) "states the general rule" of preemption, while Section 253(c) "provides the exception—a safe harbor functioning as an affirmative defense—to that rule." *Id.* at 27a-28a. The court then stated that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition." *Id.* at 29a. Relying on the FCC's *California Payphone Order*, the court explained that, in order to prevail on a claim of preemption under Section 253(a), a plaintiff "need not show a complete or insurmountable prohibition, but it must show an existing material interference with the ability to compete in a fair and balanced market." *Id.* at 31a (citation omitted).

Applying its interpretation of Section 253, the court of appeals found "insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations." 08-626 Pet. App. 32a. In reaching that conclusion, the court emphasized Level 3's acknowledgment that it could not "state with specificity what additional services it might have provided had it been able to freely use the money that it was forced to pay to the City for access to the public rights-of-way." *Ibid.* (quotation marks omitted). The court further concluded that, because Level 3 had failed to carry its burden of showing that the city's license fee fell within Section 253(a), it was "premature" to consider whether the fee was "fair and reasonable" under Section 253(c). *Id.* at 32a-33a. The court stated that Section 253(c) does not have independent preemptive effect, but instead is a safe harbor for legal requirements that would otherwise violate Section 253(a). *Id.* at 28a-29a.

c. On remand, the district court denied Level 3's request to reopen discovery, and it upheld the city's ordinance and its license agreement in their entirety. 08-626 Pet. App. 10a-22a. The Eighth Circuit affirmed. *Id.* at 1a-9a.

3. *No. 08-759.* a. This case involves a San Diego County ordinance that "imposes restrictions and permit requirements on the construction and location of wireless telecommunications facilities," such as cell towers. 08-759 Pet. App. 2a. The ordinance prescribes application requirements for parties seeking to construct wireless facilities (*id.* at 100a-102a); creates a four-tier application-processing system based "primarily on the visibility and location of the proposed facility" (*id.* at 3a; see *id.* at 102a-107a); designates certain zones and locations as "preferred" for the siting of wireless facilities (*id.* at 107a-110a); and establishes various design and maintenance standards for such facilities (*id.* at 110a-113a). The county "retains discretionary authority to deny a use permit application or to grant the application conditionally." *Id.* at 4a.

Petitioner Sprint Telephony PCS, L.P. (Sprint) sued San Diego County in the United States District Court for the Southern District of California, alleging that the ordinance was preempted under Section 253. 08-759 Pet. App. 4a-5a. The district court granted in part and denied in part Sprint's motion for partial summary judgment. *Id.* at 54a-55a. The court concluded (*id.* at 61a-64a) that Sprint could invoke Section 253 as a possible basis for preemption notwithstanding 47 U.S.C. 332(c)(7), which addresses the application of state and local zoning laws and "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of

[wireless] facilities." *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005).

Turning to the merits of the Section 253 claim, the district court concluded that San Diego's wireless-siting ordinance, viewed together with the county's non-telecommunications-specific "use permit" regulations, had "the collective effect of prohibiting the provision of telecommunications service." 08-759 Pet. App. 70a. The district court stated that, under the county's regulatory framework, applicants must comply with "burdensome submission requirements," must "state their willingness" to allow other carriers to co-locate their facilities with those of the applicant, and are subject to unrestricted public hearings and the county's "unfettered discretion" as to whether a permit will be granted or modified and the conditions that will be imposed. *Id.* at 70a-71a.

b. A panel of the Ninth Circuit affirmed, 08-759 Pet. App. 18a-53a, but the Ninth Circuit then granted rehearing en banc and unanimously reversed the district court's judgment, *id.* at 1a-17a. The en banc court first considered the relationship between Sections 253 and 332(c)(7). *Id.* at 6a-13a. The court observed that Section 332(c)(7)(B)(i)(II) preempts local regulations that "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. 332(c)(7)(B)(i)(II). The court explained that, under circuit precedent, "a locality runs afoul of that provision if (1) it imposes a 'city-wide general ban on wireless services' or (2) it actually imposes restrictions that amount to an effective prohibition." 08-759 Pet. App. 8a (quoting *MetroPCS, Inc.* v. *City & County of San Francisco*, 400 F.3d 715, 730 (9th Cir. 2005)). In contrast, the court noted that, beginning with *City of Auburn* v. *Qwest*

Corp., 260 F.3d 1160 (2001) (*Auburn*), cert. denied, 534 U.S. 1079 (2002), the Ninth Circuit had interpreted Section 253(a)'s "nearly identical text" to reach local regulations that "'may . . . have the effect of prohibiting'" the provision of telecommunications services. 08-759 Pet. App. 8a (quoting *Auburn*, 260 F.3d at 1175); see *Qwest Corp.* v. *City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004), cert. denied, 544 U.S. 1049 (2005). Under the *Auburn* standard, a local regulation would be preempted if it "'allow[ed] a city to bar' provision of services" because, for instance, it "imposed procedural requirements, charged fees, authorized civil and criminal penalties, and * * * reserved discretion to the city to grant, deny, or revoke" permits. 08-759 Pet. App. 8a-9a (quoting *Auburn*, 260 F.3d at 1176).

The Ninth Circuit concluded that the *Auburn* standard was not consistent with the language of Section 253. 08-759 Pet. App. 10a-11a. Accordingly, the court "overrule[d] *Auburn* and join[ed] the Eighth Circuit in holding that 'a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.'" *Id.* at 11a (quoting 08-626 Pet. App. 29a). Having thus "harmonize[d]" its "interpretations of the identical relevant text in §§ 253(a) and 332(c)(7)(B)(i)(II)," the court concluded that it "need not decide whether Sprint's suit falls under § 253 or § 332." *Id.* at 13a.

Turning to the merits of the preemption claim, the court of appeals held that, because Sprint had raised a facial challenge to San Diego's ordinance, Sprint was required to establish that "no set of circumstances exists under which the [ordinance] would be valid." 08-759 Pet. App. 13a-14a (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). The court concluded that Sprint

had failed to make that showing. *Id.* at 14a-17a. The court acknowledged that the ordinance granted local officials "some discretion" with respect to wireless-siting applications, and that it imposed various application and public hearing requirements on providers. *Id.* at 15a. The court determined, however, that those provisions would not necessarily be implemented in a manner that would cause wireless services to be effectively prohibited. *Id.* at 14a-15a. The court explained that "[i]t is certainly true that a zoning board *could* exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of * * * the provision of wireless services and other valid public goals such as safety and aesthetics." *Id.* at 15a. The court also concluded that Sprint "ha[d] not identified a single [substantive] requirement" of the ordinance "that effectively prohibits it from providing wireless services." *Id.* at 15a-16a.

DISCUSSION

Although some aspects of the Eighth and Ninth Circuits' opinions might be read to suggest an unduly narrow understanding of Section 253(a)'s preemptive scope, neither decision warrants this Court's review. Both courts of appeals correctly held that a plaintiff seeking preemption under Section 253 cannot meet its burden simply by alleging that, under circumstances that might exist at some indeterminate future time, a legal requirement "may" affect its ability to provide a telecommunications service. Instead, a plaintiff must present evidence of the practical effects of the requirement at issue. In these cases, the courts of appeals concluded that

petitioners had failed to carry that burden. Those case-specific determinations do not warrant further review.

Nor is there a clear conflict among the circuits on the standard for preemption under Section 253(a). The courts of appeals uniformly recognize that the FCC's *California Payphone Order*, 12 F.C.C.R. 14,191 (1997), prescribes the applicable standard for determining whether a legal requirement has the effect of prohibiting the ability to provide a telecommunications service. Although some circuits have interpreted the Commission's standard through the lens of *Auburn*'s more-preemptive "may" standard—contrary to the approach of the Eighth and Ninth Circuits' decisions here—the conflict is not sufficiently settled or stark to warrant this Court's resolution at this time. Moreover, the Commission can use its authority under Section 253(d) to help correct and unify the interpretation and application of Section 253, obviating the need for this Court's intervention. Review is likewise not warranted to address the shallow disagreement between the Eighth and Sixth Circuits about whether Section 253(c) operates as an independent basis for preemption.

Finally, neither of the petitions presents a good vehicle for this Court's consideration of the questions presented. Both courts of appeals relied on petitioners' failure to develop substantial evidentiary records concerning the practical impact of the regulations at issue on the provision of telecommunications service. The Court could more fully consider the questions presented in a case with a better-developed factual record. In addition, in No. 08-759, there is an unresolved threshold question whether Section 253 applies to municipal ordinances that regulate the siting of wireless facilities. That issue does not independently warrant review, and

it would be a potential barrier to this Court's resolution of the question presented in the case.

A. The Eighth And Ninth Circuits Correctly Held That Preemption Under Section 253(a) Must Be Based On The Actual Effect Of A Law, Rather Than The Mere Possibility Of A Future Effect

1. The Eighth and Ninth Circuits held "that a plaintiff suing a municipality under section 253(a) must show" that the municipal ordinance that it seeks to have preempted results in the "actual or effective prohibition" of a carrier's ability to provide telecommunications services, "rather than the mere possibility of prohibition." 08-626 Pet. App. 31a; see 08-759 Pet. App. 11a. That conclusion is consistent with the language of Section 253(a) and with the Commission's decisions applying that provision.

Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a). As the Eighth Circuit observed, the "subject of the sentence * * * is followed by two discrete phrases, one barring any regulation which prohibits telecommunications services, and another barring regulations achieving effective prohibition." 08-626 Pet. App. 30a; accord *California Payphone Order*, 12 F.C.C.R. at 14,205-14,206 ¶¶ 30-31.

Focusing on the word "may" in Section 253(a), some courts of appeals have suggested that "'regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted,'" without regard to their "actual impact" on service providers.

Qwest Commc'ns, Inc. v. *City of Berkeley*, 433 F.3d 1253, 1256-1257 (9th Cir. 2006) (quoting *Qwest Corp.* v. *City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004), cert. denied, 544 U.S. 1049 (2005)). That suggestion is incorrect, and petitioners make little effort to defend it. As the Ninth Circuit explained below, "Congress' use of the word 'may' works in tandem with the negative modifier '[n]o' to convey the meaning that 'state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service.'" 08-759 Pet. App. 10a-11a. Thus, the word "may" is properly read in this context not to refer to the possible or conceivable effects of a regulation, but rather to deny permission to States and localities to enforce the types of legal requirements that Section 253(a) forbids. Nothing in the text of Section 253(a) "results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services." 08-626 Pet. App. 30a.

The Eighth and Ninth Circuits' interpretation of Section 253(a) appears to be consistent with that of the FCC. In determining whether a state or local requirement has "the effect of prohibiting the ability" of an entity to provide telecommunications services, the Commission has looked to the "practical effect" of the requirement on the entity. *Public Util. Comm'n of Tex.*, 13 F.C.C.R. 3460, 3470 ¶ 22 (1997) (*Texas PUC Order*).[1]

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[1] See *California Payphone Order*, 12 F.C.C.R. at 14,209 ¶ 38 (to violate Section 253(a), the city's contracting conduct "would have to actually prohibit or effectively prohibit the ability of a payphone service provider" to offer payphone service); *Petition of Pittencrieff Commc'ns, Inc. for Declaratory Ruling Regarding Preemption of the Tex. Pub. Util. Regulatory Act of 1995*, 13 F.C.C.R. 1735, 1752 ¶ 32 (1997) (declining to preempt where "there is no evidence on this record that these

The mere possibility that a state or local requirement might prevent a telecommunications carrier from providing service is not sufficient to violate Section 253(a).

2. Petitioners argue (08-626 Pet. 12-13; 08-759 Pet. 16) that the Eighth and Ninth Circuits interpreted Section 253(a) to require a provider to prove that it has been completely excluded from providing service in order to establish a successful preemption claim. Such an interpretation would create a serious conflict with the Commission's understanding of Section 253(a), and it would undermine the federal competition policies that the provision seeks to advance. As the Commission has explained, "Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers,"[2] and it enacted Section 253 "to ensure that its national competition policy for the telecommunications industry * * * could not be frustrated by the isolated actions of individual municipal authorities or states." *Texas PUC Order*, 13 F.C.C.R. at 3463 ¶ 4. Because the "goal of opening local markets to competition" can be frustrated "not only [by] express restrictions on entry, but also [by] restrictions that indirectly produce that result," *id.* at 3480 ¶ 41, the Commission has interpreted Section 253(a) to reach any legal barrier that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment," *California Payphone Or-*

[state universal service contribution] requirements actually have [the] effect" of prohibiting an entity from providing service).

[2] *Silver Star Tel. Co. Petition for Preemption & Declaratory Ruling*, 12 F.C.C.R. 15,639, 15,656-15,657 ¶ 38 (1997), aff'd, 13 F.C.C.R. 16,356 (1998), petition for review denied *sub nom. RT Commc'ns v. FCC*, 201 F.3d 1264 (10th Cir. 2000).

der, 12 F.C.C.R. at 14,206 ¶ 31. Contrary to petitioners' arguments, however, the decisions below need not be read as confining the application of Section 253(a) to only those legal requirements that completely bar new entry.

a. The Eighth Circuit made clear in its opinion that a plaintiff need not show a "complete or insurmountable prohibition" to prevail under Section 253(a). 08-626 Pet. App. 31a. Rather, the court, citing the *California Payphone Order*, announced a preemption standard that is substantially similar to the Commission's—*i.e.*, whether the challenged requirement creates "an existing material interference with the ability to compete in a fair and balanced market." *Ibid.*; see *id.* at 32a (stating that the relevant inquiry is "whether the City's ordinance actually or effectively prohibited or materially inhibited Level 3's ability to provide telecommunications services").

Moreover, contrary to Level 3's contention (08-626 Pet. 14, 17-18), nothing in the Eighth Circuit's decision states that existing carriers, such as Level 3, must exit the market before they can bring a Section 253 claim. Instead, the court reviewed the record and found "insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations." 08-626 Pet. App. 32a. The court appears to have accorded inordinate significance to Level 3's inability to "state with specificity what additional services it might have provided" if it were not required to pay St. Louis's license fee. *Ibid.* (quotation marks and citation omitted). That specific failure of proof—which the court of appeals seems to have regarded as emblematic of broader evidentiary deficiencies in Level 3's case—is not central to a proper Section 253(a) inquiry. Nevertheless, because the Eighth Circuit properly stated a pre-

emption standard that is consistent with the Commission's, that shortcoming in its explanation of its decision does not require this Court's correction.

b. Similarly, the decision of the Ninth Circuit can reasonably be understood to reflect a mode of analysis that is consistent with the FCC's interpretation of Section 253. To be sure, that court did not expressly adopt the Commission's "existing material interference" test. Portions of the Ninth Circuit's decision, moreover, could be read to suggest that a Section 253 plaintiff must show effective preclusion—rather than simply material interference—in order to prevail. See 08-759 Pet. App. 8a-9a (noting that, under the *Auburn* standard, which the court overruled, local regulations that "create[] a substantial barrier" to the provision of service would be preempted) (quotation marks and citation omitted). As discussed above, limiting the preemptive reach of Section 253(a) to legal requirements that completely preclude entry would frustrate the policy of open competition that Section 253 was intended to promote.

Notwithstanding those concerns, further review of the Ninth Circuit's decision is not warranted, because the en banc court did not reject the Commission's standard. To the contrary, the court cited the *California Payphone Order* as relevant authority, and it stated that "our interpretation is consistent with the FCC's." 08-759 Pet. App. 11a. In addition, the court determined that San Diego would violate Section 253(a) if it implemented its wireless siting ordinance in a manner that "stall[ed] applications" or "impose[d] an excessively long waiting period," *id.* at 15a. That observation demonstrates the court's recognition that Section 253 can preempt legal requirements that fall short of a complete ban on service. Indeed, because the Ninth Circuit

viewed Sprint's challenge to San Diego's wireless siting ordinance as a facial challenge governed by *United States* v. *Salerno*, 481 U.S. 739 (1987)—under which a plaintiff must show that there is "no set of circumstances" under which the challenged statute would be valid (*id.* at 745)—the court did not foreclose a future challenge to San Diego's ordinance based on evidence that the county is implementing the ordinance in a manner that materially inhibits or limits carriers' ability to provide telecommunications services. 08-759 Pet. App. 15a. For those reasons, there is no sound basis for concluding that the Ninth Circuit's reading of Section 253(a) will frustrate federal competition policy goals.

B. There Is No Conflict Among The Courts Of Appeals That Warrants This Court's Intervention At This Time

1. The Eighth and Ninth Circuits correctly recognized that their view of the Section 253(a) preemption standard differs in some respects from that of the First, Second, and Tenth Circuits. 08-759 Pet. App. 9a; see 08-626 Pet. App. 30a. Although petitioners characterize the differences as "widespread" (08-626 Pet. 24) and "substantial" (08-759 Pet. 13), the courts of appeals in fact agree on the starting point for analysis. The First, Second, and Tenth Circuits, like the Eighth and Ninth Circuits, have correctly cited the Commission's *California Payphone Order* as relevant authority regarding the standard to be applied under Section 253(a). See *Puerto Rico Tel. Co.* v. *Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *TCG New York, Inc.* v. *City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002), cert. denied, 538 U.S. 923 (2003); *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004) (*Santa Fe*). Moreover, the First, Second, and Tenth Circuits, like the Eighth

Circuit, have expressly recognized that, under the *California Payphone Order*, a state or local requirement violates Section 253 if it materially inhibits the ability of competitors to provide service, even if it does not completely preclude the provision of service. *Puerto Rico Tel. Co.*, 450 F.3d at 18; *TCG New York*, 305 F.3d at 76; *Santa Fe*, 380 F.3d at 1271.

To be sure, the First, Second, and Tenth Circuits have applied the "materially inhibits" standard through the lens of *Auburn*, under which a legal requirement was subject to preemption if it *might* have had the effect of prohibiting the ability of an entity to provide telecommunications services. See *Puerto Rico Tel. Co.*, 450 F.3d at 18 ("Section 253(a) preempts laws that 'may prohibit or have the effect of prohibiting' the provision of telecommunications services.") (citation omitted); *Santa Fe*, 380 F.3d at 1270 & n.9 (applying *Auburn* standard); *TCG New York*, 305 F.3d at 76 (suggesting that a local government's reservation of the "right to prohibit" service amounts to a violation of Section 253(a)). That approach has led the Second and Tenth Circuits to suggest that Section 253(a) can preempt local ordinances that grant municipal officials discretion to forestall or deny applications for required permits or franchises, even in the absence of any evidence that the officials have actually exercised their discretion in a manner that has harmed competitive entry. *TCG New York*, 305 F.3d at 76-77; *Santa Fe*, 380 F.3d at 1270.[5]

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[5] The First Circuit has not considered whether the vesting of broad discretion in local decisionmakers constitutes a violation of Section 253(a). In *Puerto Rico Telephone Co.*, the First Circuit concluded that a locality's decision to substantially increase its fees would significantly harm the profitability of the carrier filing suit. 450 F.3d at 18-19. That record-specific determination does not conflict with any decision

Although those courts could be viewed as disagreeing with the Ninth Circuit's conclusion here that the existence of discretion is not by itself sufficient to support preemption, it is significant that, in both *TCG New York* and *Santa Fe*, the providers bringing suit had made initial attempts to invoke the localities' permitting process, rather than challenging the ordinances on their face, as Sprint did in the Ninth Circuit. *TCG New York*, 305 F.3d at 71; *Santa Fe*, 380 F.3d at 1262-1263. Neither the Second nor the Tenth Circuit has invalidated an ordinance without having before it some evidence of the ordinance's practical effect.

More importantly, since the Second and Tenth Circuits' decisions relying on *Auburn* were issued, the Eighth Circuit has declined to follow *Auburn*, and the en banc Ninth Circuit has overruled it. In light of those developments, it is unlikely that additional circuits will follow the repudiated *Auburn* decision, and those that already have done so may reconsider the issue. Indeed, even the petitioners here do not attempt to defend the interpretation of Section 253(a) articulated in *Auburn*. This Court therefore should allow courts of appeals and the Commission to continue to develop the law in this area rather than taking up the issue at this time.

2. The Commission's express statutory authority to preempt state and local legal requirements that violate Section 253(a) provides an additional reason for this Court to deny review in these cases. See 47 U.S.C.

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of another court of appeals. The Eighth Circuit likewise has not addressed the relevance of local discretion under Section 253(a). The district court in this case found that St. Louis's ordinance did *not* provide local authorities with unfettered discretion over rights-of-way applications. 08-626 Pet. App. 58a, 59a, 65a, but the Eighth Circuit did not address that issue in rejecting Level 3's preemption claim.

253(d). As noted above, the courts of appeals generally agree that the FCC's *California Payphone Order* prescribes the relevant test for determining whether a legal requirement has the "effect of prohibiting the ability of any entity to provide any * * * telecommunications service" (47 U.S.C. 253(a)). Any disagreement among the circuits chiefly involves the application of that test to various types of state and local regulations. If such disagreements cause significant divergence in outcomes among the circuits, the Commission can restore uniformity by issuing authoritative rulings on the application of Section 253(a) to particular types of state and local requirements. Those rulings will govern the disposition of Section 253(a) claims brought in the federal courts. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U. S. 967, 982-983 (2005) (holding that an agency's reasonable interpretation of an ambiguous statute is authoritative and binding on the courts of appeals, even those that have previously interpreted the statute differently). The Commission's ability to eliminate any conflict provides an additional reason for this Court to deny review here. Cf. *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991).

3. The Eighth Circuit noted (08-626 Pet. App. 29a) that its conclusion that Section 253(c) is not an independent basis for preemption, but instead a safe harbor for legal requirements that would otherwise violate Section 253(a), is inconsistent with the approach taken by the Sixth Circuit in *TCG Detroit* v. *City of Dearborn*, 206 F.3d 618 (2000). In *TCG Detroit*, the Sixth Circuit concluded that a municipal franchise fee did not violate Section 253(a), but it then went on to consider whether the fee was "fair and reasonable" under Section 253(c). *Id.* at 624 (quotation marks omitted). Although the Sixth

Circuit did not say so explicitly, its analysis suggests that it viewed Section 253(c) as having independent preemptive force. See *ibid.*

The Eighth Circuit's interpretation of Section 253(c) is correct. As the Commission has observed, Section 253(a) "is the only portion of section 253 that broadly limits the ability of states to regulate. All of the remaining subsections * * * carve out defined areas in which states may regulate." *Texas PUC Order*, 13 F.C.C.R. at 3481 ¶ 44. Thus, Subsection (c) makes clear that "*[n]othing in this section* affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation" so long as those actions fall within the terms of the subsection. 47 U.S.C. 253(c) (emphasis added). The Eighth Circuit was therefore correct when it concluded that Section 253(c) "'derives meaning only through its relationship to [Section 253(a)]'" and "standing alone, 'cannot form the basis of a cause of action against a state or local government.'" 08-626 Pet. App. 29a (quoting *BellSouth Telecomms., Inc.* v. *Town of Palm Beach*, 252 F.3d 1169, 1187, 1189 (11th Cir. 2001)).

The inconsistency between the Eighth Circuit's decision and the Sixth Circuit's analysis in *TCG Detroit* does not warrant this Court's review. The Sixth Circuit's suggestion that Section 253(c) might provide an independent basis for preemption was dicta, since the court ultimately concluded that Section 253(c) did not preempt the challenged local law. See *TCG Detroit*, 206 F.3d at 624-625. No other court of appeals has adopted the Sixth Circuit's approach, and cases in which the courts are asked to apply Section 253(c) independently of Section 253(a) are rare.

C. Neither Petition Presents An Appropriate Vehicle For This Court's Review Of The Questions Presented

1. *No. 08-626.* The petition in No. 08-626 is not an appropriate vehicle for consideration of the Section 253(a) standard because there does not appear to be a fully developed record on the effect of St. Louis's ordinance on the ability of Level 3—or any other competitor—to provide telecommunications services. Although Level 3 challenges various non-fee provisions of St. Louis's ordinance, its principal dispute is with the license fee that St. Louis imposes on the company for access to municipal rights-of-way. The district court, however, did not engage in particularized fact-finding on the effect of any of the challenged provisions on Level 3. Instead, relying on *Auburn*, it simply described the challenged law and then concluded summarily that "the ordinance includes several provisions that in combination have the effect of prohibiting the ability to provide telecommunications services under 47 U.S.C. § 253(a)." 08-626 Pet. App. 49a (quotation marks omitted). The Eighth Circuit likewise did not discuss the record at any length, but simply concluded that Level 3 had failed to meet its burden under Section 253(a). *Id.* at 32a-33a. The undeveloped state of the record is further reflected in Level 3's attempt to reopen discovery after remand in order to "gather further evidence of 'actual or effective prohibition.'" *Id.* at 3a (citation omitted). And the absence of particularized fact-finding is especially problematic because key facts relevant to Level 3's preemption claims appear to be in dispute. See 08-626 Br. in Opp. 2-9 & nn.2, 4, 5, 6. The inadequacy of the evidentiary record provides an additional reason for the Court to deny review in No. 08-626.

2. *No. 08-759.* This case likewise does not appear to present a sufficient record for this Court to consider the standard for preemption under Section 253(a). Neither the district court nor the court of appeals looked beyond the face of San Diego's wireless-siting ordinance to consider its practical effect on the ability of a carrier to provide telecommunications services. 08-759 Pet. App. 14a-16a, 48a, 70a-74a. Thus, as it comes to this Court, the case contains no analysis by the lower courts of the "practical effect," *Texas PUC Order*, 13 F.C.C.R. at 3470 ¶ 22, of the San Diego ordinance on wireless carriers' ability to provide service in a "fair and balanced legal and regulatory environment," *California Payphone Order*, 12 F.C.C.R. at 14,206 ¶ 31.

In addition, No. 08-759 raises an unresolved threshold question: whether Section 253(a) applies to wireless-siting ordinances or whether, instead, such ordinances can be challenged only under Section 332(c)(7). Sprint argues (08-759 Pet. 26 & n.7) that it can "plainly" challenge San Diego's wireless-siting ordinances under Section 253(a) because "Section 253(a) applies to challenges to 'statutes' and 'regulations,' * * * whereas Section 332(c)(7) applies only to challenges to particular 'decisions' made by local authorities." But San Diego contends (08-759 Br. in Opp. 34) that because Section 332(c)(7)(B)(i)(II) refers to state and local "regulation of the placement, construction, and modification" of wireless facilities, Section 332(c)(7) provides the exclusive statutory mechanism for challenging wireless-siting regulations as well as decisions about individual facilities.

The Ninth Circuit found it unnecessary to resolve that question because it construed Sections 253(a) and 332(c)(7)(B)(i)(II) to impose the same preemption standard. See 08-759 Pet. App. 13a. The court might revisit

that conclusion, however, if this Court were to reverse the Ninth Circuit's interpretation of Section 253(a). In addition, the Commission is now considering the relationship between Sections 253(a) and 332(c)(7)(B)(i)(II) in connection with a pending petition for a declaratory ruling.[4] By denying review in this case, the Court would give the expert agency charged with the administration of the statute an opportunity to address that unresolved question.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
ERIC D. MILLER
Assistant to the Solicitor General

P. MICHELE ELLISON
Acting General Counsel
JOSEPH R. PALMORE
Deputy General Counsel
RICHARD K. WELCH
Deputy Associate General Counsel
NANDAN M. JOSHI
Counsel
Federal Communications Commission

MAY 2009

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[4] CTIA—The Wireless Association's Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165 (filed July 11, 2008).

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No. 08-626

In the Supreme Court of the United States

LEVEL 3 COMMUNICATIONS, LLC,

Petitioner,

v.

CITY OF ST. LOUIS, MISSOURI.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AT&T INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JEFFREY A. BERGER
Mayer Brown LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

JOHN MUENCH
Counsel of Record
SARAH E. RAUH
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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QUESTION PRESENTED

Amicus curiae will address the question of whether the Eighth Circuit's interpretation of 47 U.S.C. § 253(a), which widened a split among the courts of appeals, diverges from the text and purposes of the Telecommunications Act of 1996.

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INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae AT&T Inc. is one of the premier telecommunications companies in the United States and throughout the world. AT&T Inc.'s many affiliates (referred to collectively as "AT&T") serve tens of millions residences, businesses, and governmental institutions in all fifty states. AT&T operates one of the largest and most sophisticated global telecommunications networks, and is a leading provider of a variety of services, including local and long distance wireline, wireless, high-speed Internet, and Wi-Fi.

For over a century, AT&T has been on the technological vanguard of the industry. It strives to introduce cutting-edge services to its customers. Its never-ending mission to provide the newest, fastest, and best service offerings to cities and their residents implicates the public right-of-way in those locales.

Put simply, AT&T's network cannot function without facilities located in the public right-of-way. The rudiments of a telecommunications network—poles, wires, fiber optic conduits, equipment cabinets, and power sources—all occupy the right-of-way. Consequently, the maintenance and improvement of AT&T's network inextricably intertwines AT&T's operations with use of the public right-of-way.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

AT&T has a substantial interest in ensuring that Section 253 of the Telecommunications Act of 1996 (the "1996 Act") continues to serve one of its key purposes—fostering technological advancement in telecommunications for the benefit of all Americans. By virtue of its national network, AT&T has wide-ranging experience with a variety of local regulations concerning the public right-of-way. Consequently, AT&T is uniquely situated to offer a perspective on how municipal legislation limiting use of the public right-of-way can impede network maintenance and technological innovation.

SUMMARY OF THE ARGUMENT

The lower court's ruling spotlights a division among the circuits that this Court should resolve. The decisions of the Eighth Circuit (and other courts) reflect a crabbed, and ultimately incorrect, interpretation of the preemption provision in the 1996 Act. In the interest of encouraging the technological advancement of the telecommunications industry, Congress enacted Section 253. That provision bars state and local regulations that prohibit or have the effect of prohibiting the ability of entities to provide telecommunications services.

Some courts have construed Section 253 to preempt state or local regulations that impede or materially impair an entity's ability to provide services. However, the Eighth and Ninth Circuits rejected that view, adopting a far narrower test that in essence eliminates the "have the effect of prohibiting" clause from Section 253. By expressly diverging from the interpretation of Section 253 adopted by the First, Second, and Tenth Circuits, the lower court

construed the 1996 Act in a manner contrary to its text and purpose.

Apart from correcting this erroneous construction of Section 253, review is necessary for two key reasons. *First*, the threat to innovation is real. Currently, AT&T and other providers must run a gauntlet of state and local impositions before accessing the right-of-way to maintain and upgrade their networks. Many of these regulations are onerous to the point of deterring or significantly delaying development—the exact opposite of what Congress intended when it enacted the 1996 Act. *Second*, a uniform standard is needed to provide national providers like AT&T with the state-to-state and city-to-city consistency necessary to foster efficient technological advancement.

ARGUMENT

I. UNCHECKED STATE AND LOCAL REGULATION IMPEDES INNOVATION.

If permitted to stand, the lower court's constrained and incorrect interpretation of Section 253(a) would render the provision a dead letter. It would impose little to no limitation on state and local regulatory roadblocks that currently threaten to undermine development and deployment of advanced telecommunications services.

A. The Eighth Circuit's Ruling Contravenes The Text and Purpose of the 1996 Act.

As the petitioner explains, the lower court's ruling cannot be reconciled with the language and purpose of the 1996 Act. Section 253(a) provides:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

47 U.S.C. § 253(a). The statute thus bars two types of regulations: (1) those that prohibit the ability of an entity to provide services; and (2) those that have the effect of prohibiting the ability of any entity to provide services. Under axiomatic canons of statutory construction, both the "prohibit" clause and the "have the effect of prohibiting" clause must be given meaning. *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) ("a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute") (internal quotation marks omitted).

Several courts have interpreted Section 253 with this "cardinal principle" in mind. The Second Circuit recognized the distinction between the two clauses, noting that "a prohibition does not need to be complete or 'insurmountable' to run afoul of § 253." *TCG N.Y., Inc.* v. *City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002). The court accordingly construed the phrase "have the effect of prohibiting" to encompass "obstacles" to the provision of telecommunications services. *Ibid.* These "obstacles" included (1) the city's right "to reject any application based on any" public interests deemed pertinent and (2) "the extensive delays" in the application process. *Ibid.* Because these "obstacles" affected the entity's "ability to compete," the ordinance violated Section 253. *Id.* at 77.

The Tenth Cir uit similarly held that an ordinance imposing a complex application process—in

which the provider had to submit a map of existing facilities and "detailed preliminary engineering plans"—"create[d] a significant burden." *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004). When combined with "broad discretionary language" in the ordinance, those provisions had "the effect of prohibiting [entities] from providing telecommunications services." *Ibid.* (internal quotation marks omitted). Moreover, the Court ruled that "[g]iven the substantial costs" it imposed, the ordinance "would 'materially inhibit' the provision of services" and accordingly violated Section 253(a). *Id.* at 1271.

Likewise, the First Circuit held that a gross revenue fee violated Section 253 because it "negatively affect[ed]" the entity's profitability by imposing "a substantial increase in costs." *Puerto Rico Tel. Co.* v. *Municipality of Guayanilla*, 450 F.3d 9, 18-19 (1st Cir. 2006). The cost increase placed "a significant burden" on the entity that had the effect of prohibiting its ability to provide services. *Id.* at 19.

Several principles may be distilled from these decisions. *First*, "[a] regulation need not erect an absolute barrier to entry in order to be found prohibitive." *Santa Fe*, 380 F.3d at 1269; *TCG*, 305 F.3d at 76 ("a prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a)").

Second, the proper test "in determining whether an ordinance has the effect of prohibiting the provision of services" is "'whether the ordinance materially inhibits or limit's the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" *TCG*, 305 F.3d at 76 (quoting *In re Cal. Payphone Ass'n*, 12

FCC Rcd 14191, at ¶ 31 (1997)); *Puerto Rico*, 450 F.3d at 19.

Third, a municipal or state regulation "'materially inhibit[s]" (*Santa Fe*, 380 F.3d at 1270) or limits the ability of an entity to provide services if it "create[s] a significant burden" (*id.* at 1270; *Puerto Rico*, 450 F.3d at 19), imposes an "obstacle" (*TCG*, 305 F.3d at 76), forces an entity to incur "substantial costs" (*Santa Fe*, 380 F.3d at 1271; *Puerto Rico*, 450 F.3d at 19), or impairs an entity's "ability to compete" (*TCG*, 305 F.3d at 76-77).

An ordinance thus violates Section 253(a) if it "*impedes* the provision of 'telecommunications service.'" *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 491 (2002) (emphasis added). An ordinance need not physically prevent an entity from providing services in order to trigger Section 253; any other rule would ignore that the language "have the effect of prohibiting" must mean something different than "prohibit." Instead, ordinances imposing "substantial costs" that chill development of new technologies or create "obstacles" that deter deployment "impede" the provision of services in violation of Section 253(a). *TCG*, 305 F.3d at 76; *Santa Fe*, 380 F.3d at 1271, *Puerto Rico*, 450 F.3d at 19.

The Eighth Circuit's ruling—along with the Ninth Circuit's recent decision in *Sprint Telephony PCS, L.P.* v. *County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc)—departed from this well-grounded interpretation. Pet. App. 29a. The Eighth Circuit "disagree[d] with the approach of [its] sister circuits" because, in its view, "they reach a conclusion contrary to a complete analysis of the section." Pet. App. 30a. While the Eighth and Ninth Circuits recite the statutory standard, for all practical pur-

poses they have failed to give meaningful content to the "have the effect of prohibiting" language, and consequently their interpretation is not faithful to the fundamental purposes of the Act. See, *e.g.*, *Sprint*, 543 F.3d at 579-80 (ruling that a regulation did not "effectively prohibit[] the provision of wireless facilities" because "none of the requirements * * * prohibits the construction of sufficient facilities").

To begin with, the constricted view of Section 253 adopted by the Eighth and Ninth Circuit disregards that section's focus on state and municipal regulation that "may prohibit or have the effect of prohibiting *the ability* of any entity" to provide such services. The lower court paid no heed to the use of the word "ability," which refers to the "[p]hysical, mental, financial, or legal power to perform." WEBSTER'S NEW COLLEGE DICTIONARY 2 (1999). Local or state regulations that create "obstacles" to deployment (*TCG*, 305 F.3d at 76), impose "substantial costs" on such deployment (*Santa Fe*, 380 F.3d at 1271; *Puerto Rico*, 450 F.3d at 19), or affect an entity's "ability to compete" (*TCG*, 305 F.3d at 77) may "impede" the financial power of an entity to offer telecommunications services.

Yet, the rulings in the Eighth and Ninth Circuits, which minimize the "have the effect of prohibiting" language, as a practical matter, may insulate such regulations from the scrutiny that Congress intended Section 253 to create. Municipalities may "impede" (*Verizon*, 535 U.S. at 491) the provision of telecommunications services—and thus may effectively prohibit an entity's ability to provide those services—through subtle, but nonetheless unreasonably cumbersome requirements for access to the

right-of-way. See *infra* Section II.B. The high burden of proof the Eighth and Ninth Circuits would impose on providers limits the opportunities to challenge such regulations. For instance, the Ninth Circuit ruled that an ordinance only "would effectively prohibit" an entity "from providing services" if it imposed a requirement with which the entity could not physically comply and still offer services, such as undergrounding wireless facilities. *Sprint*, 543 F.3d at 580.

Such a test conflates "prohibit" with "have the effect of prohibiting," writing the latter clear out of the statute. Under the Eighth and Ninth Circuit rules, even if a regulation imposes "a substantial increase in costs" (*Puerto Rico*, 450 F.3d at 19), or impairs an entity's "ability to compete" (*TCG*, 305 F.3d at 76-77) Section 253 would afford little protection. For instance, both a reduction in the geographic scope of a service or a delay in the deployment of a new service caused by state and local regulations affect an entity's "ability to compete," but in the Eighth and Ninth Circuits, a provider faced with such impediments may have no remedy.

The Eighth and Ninth Circuits' rulings also run contrary to the purposes of the 1996 Act. "Congress enacted the Telecommunications Act of 1996 (TCA) to promote competition and higher quality in American telecommunications services and to 'encourage the rapid deployment of new telecommunications technologies.'" *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005) (internal citation omitted). Yet, unassailable restrictions on providers' abilities to make network improvements in the public right-of-way discourages precisely the type of technological advancement that Congress sought to

promote. As explained below, local regulations have been and continue to be a brake on the rapid deployment of cutting-edge services, such as enhanced wireless, high speed data transmission, and Internet Protocol-based voice and video. Whereas the lower court's constrained reading of Section 253 would fail to curb such state and local regulatory excesses, the First, Second, and Tenth Circuits have adhered to an interpretation of Section 253 that is more faithful to its text and purpose.

B. Providers Face a Gauntlet of Barriers to the Public Right-of-Way.

As providers strive to offer new services and improve their existing networks—moving towards the realization of the 1996 Act's goals—they face a complex web of state and local impediments to their use of the public right-of-way.

More established telecommunications entities need to access the public right-of-way to provide new and advanced services no less than new entrants, such as Level 3. Indeed, the 1996 Act equally protects incumbents' and competitors' access to the right-of-way. This equivalency reflects, among other things, the notion that one locality's incumbent is another's new entrant. While AT&T serves as an incumbent local exchange carrier in some areas, it serves as a competitive local exchange carrier in others. Moreover, innovation is hardly the unique province of newcomers: established entities are powered by strong engines of technological development.[2]

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[2] AT&T does not concur with the petitioners' implication that there is a distinction to be made between new entrants and established providers for purposes of Section 253. Moreover, AT&T disagrees with the notion that its affiliate (Southwestern

In many localities, established providers already own and operate facilities in the right-of-way. To maintain the strength of their existing networks, they must perform work on those facilities in the right-of-way. For example, if underground wires begin to outlast their natural lives, they must be replaced, a form of maintenance that often necessitates encroachment into the right-of-way.

Construction of new facilities needed to deploy cutting-edge technology similarly necessitates access to the public right-of-way. For instance, providers may need to place new equipment near public roads and sidewalks. The construction and placement of this new equipment may require excavation and construction of new conduits. Laying new fiber-optic cable, for instance, often requires digging in and eventually resurfacing the right-of-way.

Yet, in city after city, legislative roadblocks individually and cumulatively impede the ability of AT&T and other providers to access the right-of-way for such improvement. A patchwork of regulations control how and when they may perform necessary work to maintain and improve their networks. Fee and franchise requirements are frequent. Permitting ordinances are ubiquitous; in some instances, a provider must obtain multiple permits to begin construction of a single facility in the public right-of-way. Conditions often accompany the permits, and they frequently place significant financial and administrative burdens on providers.

Bell Telephone Company) somehow is free from certain taxes and fees in St. Louis to which petitioner must adhere. Pet. 6. Nonetheless, AT&T agrees with the petitioner that the Eighth Circuit misinterpreted Section 253, exacerbating a circuit split desperately in need of resolution by this Court.

Examples of the impositions faced by providers around the country help to illustrate the problem:

• Providers of telecommunications services are often subjected to mandatory disclosure of sensitive financial, proprietary, and strategic information that may constitute an effective prohibition on the ability of an entity to create and provide innovative telecommunications services. *Santa Fe*, 380 F.3d at 1262; *TCG*, 305 F.3d at 81. Naturally, state and local governments need to know some information about telecommunications providers operating in the right-of-way.

But the "submission of a wide range of financial information" bearing no relation "to use of the city's rights-of-way" may force providers to reveal their strategic plans years into the future. *AT&T Comms. of Southwest, Inc.* v. *City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998) (AT&T demonstrated a substantial likelihood of success on the claim that Section 253(a) preempted the franchise ordinance where many of the requirements were "totally unrelated to use of the city's rights-of-way"); see *BellSouth Telecomms., Inc.* v. *Town of Palm Beach*, 252 F.3d 1169, 1180 (11th Cir. 2001) (ordinance's informational requirements "not limited to, requests for information concerning the rights-of-way").

Similarly, telecommunications providers are often required to submit detailed maps that show the precise location of existing and future facilities. *XO Missouri, Inc.* v. *City of Maryland Heights*, 256 F. Supp. 2d 987, 990, 997 (E.D. Mo. 2003); *Qwest Corp.* v. *City of Portland*, No. Civ. 01-1005JE, 2006 WL 2679543, at *7 (D. Or. Sept. 15, 2006). Such mapping requirements may impose "substantial costs." For example, a mandate that maps be provided in a

particular format may result in extraordinary expenses if any entity does not maintain that information in the desired format and has to transform the information to comply with an ordinance. *XO Missouri*, 256 F. Supp. 2d at 992 (ordinance required "provider to furnish maps of the location of all its facilities in a format designated by the City Engineer"); *NextG Networks of California, Inc.* v. *County of Los Angeles*, 522 F. Supp. 2d 1240, 1249-1250 (C.D. Cal. 2007) (ordinance required providers to "produce various customized maps * * * in the number prescribed and drawn to a scale specified by the Director").

Another cost, perhaps even more significant, is the price of competitive disadvantage. If a competitor can learn from a public submission about a provider's planned expenditures on new facilities in a city, it may gain an advantage in terms of its own competitive decisions. The price of deployment of facilities used to support new and innovative telecommunications services then becomes disclosure of providers' strategic plans to any and all competitors.

Such disclosures may affect an entity's "ability to compete" (*TCG*, 305 F.3d at 76-77) and cause "a substantial increase in costs" (*Puerto Rico*, 450 F.3d at 19) by obviating the first-mover advantage that is critical to success—and provides the financial impetus for innovation—in the telecommunications industry. AT&T, and perhaps other providers as well, have either not deployed facilities that would have provided new services, or faced significant delays in deploying such facilities, as a result of onerous informational requirements that bear no rational relationship to reasonable right-of-way management. Such regulations "impede," "materially inhibi[t],"

and limit a provider's "ability to compete." *Verizon*, 535 U.S. at 491; *TCG*, 305 F.3d at 76-77.

• Even after providers comply with an array of ordinances (often at great cost), they may still be denied access to the public right-of-way by acts of unfettered administrative discretion. *Santa Fe*, 380 F.3d at 1270 (city had "unfettered discretion" to deny access to public right-of-way); *TCG*, 305 F.3d at 81 (ordinance permitted consideration of any factor deemed to be in the public interest in deciding whether to grant a franchise); *XO Missouri*, 256 F. Supp. 2d at 996 (license could be denied based on any factors the "administrator may deem relevant") (internal quotation marks omitted); *NextG (Los Angeles)*, 522 F. Supp. 2d at 1251 (same). For some cities, highly subjective aesthetic considerations alone can determine whether a provider may access the right-of-way. *Sprint PCS Assets, L.L.C.* v. *City of La Canada Flintridge*, 435 F.3d 993, 994 (9th Cir. 2006) (administrator could deny permit if proposed project had a "negative aesthetic impact"); *NextG Networks of California, Inc.* v. *City of Huntington Beach*, SACV 07-1471, slip op. at 25 (C.D. Cal. Feb. 7, 2008) (same).

Decision-making marked by unbounded discretion or subjective considerations invokes the "prohibit" clause because an arbitrary decision to deny access to the right-of-way directly bars the provision of services. *Santa Fe*, 380 F.3d at 1270 ("broad discretionary language has been repeatedly held to be prohibitive"). It also implicates the "have the effect of prohibiting" clause because the lack of certainty combined with the "substantial costs" of complying with state and local regulations (*id.* at 1270-71) may

"impede" or "materially inhibit" the provision of services.

• Excessive and unreasonable fees and payments unrelated to the management of the right-of-way may also have the effect of prohibiting the ability of a provider to offer new services. While Congress recognized that some fees are appropriate if they relate to the management of the right-of-way (see 47 U.S.C. § 253(c)), some municipalities demand payment of significant fees bearing no connection to expenses incurred by the City in governing the right-of-way. *Puerto Rico*, 450 F.3d at 12 (imposing a 5% gross revenue fee); *City of Dallas*, 8 F. Supp. 2d at 593 (imposing a 4% gross revenue fee on *all* operations in Dallas regardless of connection to the right-of-way). Others require providers to incur the significant cost of creating excess conduit capacity and dedicating it to the municipality. *Santa Fe*, 380 F.3d at 1272-73 (requiring entity to build double the conduit capacity and dedicate the excess to the City, at an estimated cost increase of 60%); *City of Dallas*, 8 F. Supp. 2d at 593 (requiring dedication of ducts and fiber optic strands to the City's exclusive use). While the construction of a modest amount of conduit space may not impede the ability of providers to offer new services, excessive requests for in-kind transfer of extra conduit space may impose precisely the "substantial costs" (*Santa Fe*, 380 F.3d at 1271) and concomitant decline in profitability (*Puerto Rico*, 450 F.3d at 19) that "impede" or "materially inhibit" the provision of services.

• Obtaining permits may be a normal cost of doing business, but in some localities telecommunications providers face permitting processes "so burdensome and Byzantine as to erect a barrier to providing

telecommunications services." *NextG* (*Los Angeles*), 522 F. Supp. 2d at 1250. Overly complex, layered, and time-consuming permitting standards and procedures can pose material, and at times prohibitive, costs. *NextG Networks of California, Inc. (Huntington Beach)*, slip op. at 22-23; *NextG Networks of California, Inc.* v. *City and County of San Francisco*, No. C 08-00958, 2008 WL 2563213, at *9 (N.D. Cal. June 23, 2008). In some instances, a convoluted permitting process may take so much time as to eliminate the competitive advantage from being the first on the market, and thus the potential profitability of an innovation. See *supra* p. 12. This is especially true for large-scale deployments of innovative network improvements where compliance with draconian permitting processes is necessary for each and every encroachment into the right-of-way. Such "extensive delays" are precisely the "obstacles" that Section 253(a) prohibits. *TCG*, 305 F.3d at 76.

• As a condition of obtaining a permit, some municipalities require providers to forego their rights to judicial recourse. *TCG*, 305 F.3d at 82. Such provisions force providers to waive their right to challenge the legality not only of burdensome processes that affect the ability of entities to offer services, but also other municipal regulations unrelated to the right-of-way. *Ibid.* In essence, providers are asked to leave their legal rights at the city line.

• Liability-shifting provisions place onerous risks on providers. For instance, some municipalities require providers to indemnify against any liability arising from use of the public right-of-way, even liability that results from the City's own negligence. Pet. 5. Such open-ended risks for incurring "substantial costs" related to litigation may "'materially

inhibit' the provision of services" in violation of Section 253(a). *Santa Fe*, 380 F.3d at 1271.

• Removal provisions further give providers pause before deploying new facilities. In some instances, municipal regulations allow a city to order the removal of a provider's facilities for any "material violation" of *any* municipal law. *XO Missouri*, 256 F. Supp. 2d at 997. Oftentimes, there is little or no guidance as to what constitutes a material violation. *Ibid.* Naturally, providers may be unwilling to invest millions in network construction if they face a complete loss of value years down the line because of a violation of a law that has no relationship to right-of-way use.

Individually, these regulatory roadblocks undercut Section 253's promise of swift technological advancement. But even if any single category of regulation did not impede the provision of services by itself, the cumulative weight of state and local regulation may violate Section 253. The burdens on providers multiply quickly. In most instances, a single permit will not open the right-of-way for all necessary repair or improvement. Instead, providers must comply with whatever processes exist for every discrete project in the public right-of-way. In the aggregate, these regulations may cause a material "increase in a [company's] costs" and consequently "reduce the profitability of its operations." *Puerto Rico*, 450 F.3d at 18-19. Such "substantial costs" may create "a significant burden" on the ability of providers to offer services. *Santa Fe*, 380 F.3d at 1270-71.

In sum, AT&T and other providers have faced and will continue to face a panoply of state and local regulations that share one common feature: they "impede" or "materially inhibit" the provisions of ser-

vices. Onerous regulatory burdens that mandate the release of proprietary information or the waiver of a provider's right to challenge local laws deter entities from spending the time and energy to improve their networks. Moreover, there is a significant disincentive for providers to make a large capital investment in facility upgrades if a municipality can order their removal for vaguely specified violations of other municipal laws.

Such regulations not only threaten to obstruct technological innovation, but also to impair maintenance of our nation's existing telecommunications network. If routine upkeep of network functions cannot occur without acquiescence to illegal regulatory burdens, providers may have less incentive to perform such repairs given their "substantial costs." *Santa Fe*, 380 F.3d at 1271. The resulting disrepair of our national telecommunications infrastructure cannot be what Congress had in mind when it enacted Section 253.

Perhaps most alarming is that many of the regulations adopted by state and local governments bear little relation to control of the public right-of-way. Congress unquestionably preserved *some* state and local power to manage the public rights-of-way. 47 U.S.C. § 253(c). However, forcing a provider to cede its legal rights to challenge state or local laws hardly constitutes management of the public way. Nor does the exaction of unreasonable in-kind benefits—such as the forced creation of excess conduit space solely for a government's benefit—represent a justifiable exercise of right-of-way management.

Congress intended Section 253 to prevent this result. The 1996 Act was supposed to "reduce regulation in order to secure lower prices and higher qual-

ity services for American telecommunications consumers." Preamble, Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). Congress used deregulation to "encourage the rapid deployment of new telecommunications technologies." *Ibid*; *see also* H.R. Conf. Rep. No. 104-458, at 113 (1996) (Congress created the Act "to provide for a pro competitive, de-regulatory national policy framework designed to accelerate rapidly private-sector deployment of advanced telecommunications and information technologies"). The rejection of the First, Second, and Tenth Circuit standard conflicts with these goals. By essentially negating the "have the effect of prohibiting" clause, the lower court's ruling opens the door to myriad local "obstacles" to the right-of-way. Those most harmed are ultimately those Congress sought to help: state and local residential consumers, businesses, and governments that benefit from access to the best and newest technology.

This case presents the Court with an appropriate vehicle to place Section 253 back on course. The Court should reverse the constrained reading of Section 253 adopted by the lower court. Instead, it should recognize that the First, Second, and Tenth Circuits better adhere to the text and purpose of Section 253 and protect against local regulations that impair the financial and legal capability of a provider to offer services. Such a ruling would be a critical step in ensuring that the 1996 Act protects the development of new technologies.

II. REVIEW IS NEEDED TO DEVELOP A UNIFORM, NATIONAL RULE.

The circuit split described in the petition has material repercussions for providers with nationwide networks, like AT&T, which face conflicting Section

253 standards across the country. "[A]n array of local telecommunications regulations that vary from community to community is likely to discourage or delay the development of telecommunications competition." *In re TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, 21442 (1997). To mitigate such disincentives for technological advancement, the Court should establish a uniform standard for Section 253.

The current patchwork approach creates a strategic quandary for providers: it is difficult to plan and deploy network improvements when a carrier faces disparate legal standards that vary depending on the circuit. AT&T, for example, is a nationwide provider of wireline, wireless, and data services. It constantly seeks to upgrade its network and deploy new and innovative services in all fifty states in which it operates. Yet, a municipal regulation that may be struck down in New York and Denver may pass muster in Kansas City or San Francisco. While regulations naturally will vary from jurisdiction to jurisdiction, the measure of their legality should remain constant throughout the land.

State-by-state inconsistency is the antithesis of the uniformity necessary to achieve the stated goals of the 1996 Act. The unpredictability inherent in navigating a welter of municipal regulations analyzed under differing interpretations of Section 253 can impede "the rapid deployment of new telecommunications technologies." Preamble, 110 Stat. at 56. It becomes extremely difficult for providers to create plans that gaze several years into the future when it is not certain the test by which a municipal ordinance will be examined.

The result may be an unfortunate disparity of offerings. For example, the services available in Albuquerque in 2008 may not be found in St. Louis until several years later, if at all, when all state and local regulatory hurdles can be cleared. In the meantime, consumers, businesses, and governments cannot obtain and use the newest and best technologies. Costs rise as administrative hindrances increase, and the companies are required to maintain multiple networks or technologies, undermining the purpose of the 1996 Act "to secure lower prices * * * for American telecommunications consumers." Preamble, 110 Stat. at 56.

The interest in development of advanced telecommunications systems is national, not local. As the FCC has explained, "[t]he telecommunications interests of constituents * * * are not only local." Rather, "[t]hey are statewide, national and international as well." *In re TCI Cablevision*, 12 FCC Rcd at 21442. "[A] patchwork quilt of differing local regulations may well discourage regional or national strategies by telecommunications providers, and thus adversely affect the economics of their competitive strategies." *Ibid.*

The lack of uniformity also creates tension with another focus of the 1996 Act—universal service. Congress articulated several principles of universal service in the Act, including a commitment that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation." 47 U.S.C. § 254(b)(2). Accordingly, providers must still provide certain services even if state and local regulations impose "substantial costs" (*Santa Fe*, 380 F.3d at 1271) or "negatively affect" an entity's profitability (*Puerto Rico*, 450 F.3d at 18). In

other industries, an entity that faces such impediments may cease serving that area, but telecommunications providers have no viable option for "exit" where they must comply with universal service and/or carrier of last resort obligations. Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 Colum. L. Rev. 473, 506-508 (1991). Even if discontinuing service were an economically viable option—and in many instances it is not—providers like AT&T cannot refuse to provide service.

By granting the petition and resolving the issue, the Court will infuse clarity into a statutory context desperately in need of it. The unduly narrow standard adopted by the Eighth and Ninth Circuits does not accord with the statutory text, which restricts state and local regulation that either "prohibits" or has "the effect of prohibiting" a provider's ability to offer services. See *supra* pp. 6-8. The realignment of Section 253 with Congress's purposes will create a uniform standard. Such consistency will assist providers in their quest to bring the most advanced telecommunications services to market as rapidly as possible. It will alleviate the current confusion that hampers providers' abilities to satisfy the goals of the Act.

"The Telecommunications Act of 1996 was nothing if not a complex balancing act among many conflicting interests. Not the least of these were the interests of state and local governments in continuing to regulate certain aspects of this industry, and the need for a uniform federal policy." *Aegerter* v. *City of Delafield*, 174 F.3d 886, 887 (7th Cir. 1999). The lower court's decision swings the pendulum too far in the direction of state and local interests, undercut-

ting the uniform federal policy Congress sought to create. This case presents the appropriate vehicle to set the statutory mechanism back to equilibrium.

CONCLUSION

The Court should grant the petition and reverse the decision of Eighth Circuit as inconsistent with the text and purpose of Section 253.

Respectfully submitted.

JEFFREY A. BERGER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

JOHN MUENCH
Counsel of Record
SARAH E. RAUH
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600
Counsel for Amicus Curiae

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